SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA, ON RELATION OF ARTHUR KASSIN, PETITIONER,

vs.

HON. RAYMOND J. MULLIGAN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13, subdivision 4	1	1
Record from D. C. U. S., Southern New York	2	1
Petition for writs of habeas corpus and certiorari	2	1
Writ of habeas corpus	11	8
Writ of certiorari	12	8
Return to writ of habeas corpus	14	10
Affidavit of J. Randall Creel	16	11
Return to writ of certiorari	18	12
Indictment in Florida (Government's Exhibit 1)	19	13
Minutes of hearing before United States Commissioner	54	37
Appearances	54	37
Offer in evidence	54	37
Testimony of Augustus O. MacDonnell	56	39
Gene Zapf	62	44
Augustus O. MacDonnell (recalled)	71	53

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1935.

—5910-C

		Page
Offer in evidence	76	57
Testimony of Augustus O. MacDonnell (recalled)	71	53
Motion to dismiss	83	63
Offers in evidence	84	63
Stipulation as to certain testimony	90	68
Testimony of Archie Kassin	91	68
Betty Kassin	98	74
Colloquy	101	77
Testimony of Augustus O. MacDonnell (recalled)	103	78
Colloquy	114	88
Testimony of Richard Gillman	116	89
Archie Kassin	138	108
Irving La Deutscher	139	109
Roger L. Main	148	116
David N. Chadwick	164	129
Julius L. Chadwick	175	137
Leo Carr	177	139
John Dickson	186	146
Leo Carr	197	156
Memorandum opinion of Judge Hulbert	200	158
Order dismissing writ	201	159
Petition for appeal	203	160
Order allowing appeal	205	161
Citation (omitted in printing)	206	
Assignments of error	207	162
Stipulation and order waiving printing of exhibits	211	164
Stipulation as to record	212	165
Clerk's certificate (omitted in printing)	213	
Opinion, per curiam	214	166
Judgment	216	168
Clerk's certificate	217	169
Order allowing certiorari	218	169

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, on the Relation of ARTHUR KASSIN, Petitioner-Appellant,

against

HONORABLE RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HONORABLE GARRETT W. COTTER, United States Commissioner for the Southern District of New York, Respondents-Appellees

STATEMENT UNDER RULE 13, SUBDIVISION 4

This is an appeal from an order of Hon. Murray Hulbert, United States District Judge, made and entered in the United States District Court for the Southern District of New York, dismissing writs of habeas corpus and certiorari in a removal proceeding. The removal proceeding was instituted before Hon. Garrett W. Cotter, United States Commissioner for the Southern District of New York, before whom hearings were had, at the conclusion of which the Commissioner recommended removal of the petitioner-appellant to the Southern District of Florida, there to stand trial upon an [fol. 2] indictment charging violation of Section 37, U. S. C. C. (conspiracy), and Section 592 of Title 12 of the United States Code. In dismissing the writs of habeas corpus and certiorari, the District Judge wrote an opinion which has not been officially reported.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, on Relation of ARTHUR KASSIN, Relator,

against

HONORABLE RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HONORABLE GARRETT W. COTTER, United States Commissioner for the Southern District of New York, Respondents

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI

To the Honorable United States District Court for the Southern District of New York:

Your petitioner, Arthur Kassin, respectfully shows and alleges:

1. That your petitioner is a citizen of the United States and is and has been a resident of the City, County, State and [fol. 3] Southern District of New York, where he resides with his wife and family.

2. That heretofore and on or about the 4th day of April, 1933, your petitioner was taken into custody and arraigned before the Hon. Garrett W. Cotter, United States Commissioner for the Southern District of New York, on a complaint theretofore filed before the said Commissioner on the 27th day of March, 1933, by one J. L. Craven, Special Agent of the Department of Justice, praying that an order be made directing the removal of petitioner to the United States District Court for the Southern District of Florida.

3. That in the aforementioned complaint it was alleged that petitioner was one of the defendants named in an indictment returned and filed in the United States District Court for the Southern District of Florida, charging petitioner and the others named therein as co-defendants with having entered into a conspiracy to defraud the Florida National Bank, of Jacksonville, Florida, a member of the Federal Reserve Bank of Atlanta, Georgia, and with having committed certain substantive offenses in connection therewith, in violation of Section 88, Title 18, United States Code (Sec. 37, U. S. C. C.), and Section 592, Title 12, United States Code.

4. That upon the arraignment referred to petitioner was enlarged upon bail furnished pending the hearing and determination of the removal proceedings instituted against him as aforesaid.

5. That several hearings were held before the said Hon. Garrett W. Cotter, United States Commissioner, the first of [fol. 4] which having taken place on or about the 16th day of May, 1933, and the last of which on or about the 19th day of June, 1934.

6. That the direct case of the Government in support of its application for the removal of your petitioner consisted of the following: the introduction in evidence, over the objection and exception of counsel for your petitioner on the

ground that the same failed to connect itself with your petitioner, of a certified copy of the indictment returned and filed in the United States District Court for the Southern District of Florida, together with a capias and the non est return of the United States Marshal (said documents being marked in evidence as Exhibits 1 and 5); the testimony of one Augustus O. MacDonald to the effect that he was the vault custodian for the St. Augustine National Bank, in St. Augustine, Florida, and that in the course of his duties as such vault custodian he observed a person whom he claimed to be your petitioner going to a safe deposit box rented by him under the name of Arthur Starke, and said MacDonald in connection with his testimony referred to a card constituting the agreement for the leasing of a safe deposit box and a card purporting to show the dates upon which the visits aforementioned were made, which said documents were received in evidence, over objection and exception of counsel for your petitioner (said documents being marked in evidence as Exhibits 2 and 3); the testimony of one Gene Zapf to the effect that he was the manager of the Casa Marina Hotel, at Jacksonville Beach, Florida, and that as such manager he had observed a person whom he claimed to [fol. 5] be your petitioner as a guest at said hotel, and which said witness referred to a registration card purporting to contain the signature of your petitioner, and so identified by said witness as such signature, which said document was received in evidence, over the objection and exception of counsel for your petitioner (said document being marked in evidence as Exhibit 4).

7. That after the Government had rested, petitioner took the stand in his own behalf and testified without contradiction that he had gone to the State of Florida on several occasions, but that the purpose of his visits were entirely unrelated to any of the matters alleged in the indictment referred to; that he had gone to the City of Jacksonville, Florida, to establish a business venture with a man who had long been a resident of that city and with whom he had become acquainted on a prior visit to Florida. Petitioner's wife testified that she knew of her own knowledge of petitioner's dealings with the man referred to and that the visits to Florida concerned themselves entirely with the consum-

mation of a pending business transaction, the nature of which was detailed in petitioner's testimony.

8. That it was stipulated and agreed by counsel for the Government that if certain named persons were called as witnesses in behalf of your petitioner, that they would testify that they knew your petitioner and knew of his reputation for honesty and veracity, and that such reputation was excellent.

9. That pursuant to orders issued by the United States District Court for the Southern District of New York, the [fol. 6] depos' on of all of the persons named in the indictment as co-defendants with the petitioner who were then in custody were taken. The taking of such depositions were attended by counsel for the Government and petitioner. All of the persons testified under oath that they were cognizant of the nature of the offenses alleged in the indictment and that to their own knowledge petitioner was not involved in any manner, shape or form in the commission of such offenses. Said depositions, duly authenticated, were marked and received in evidence.

10. That on or about the 12th day of May, 1934, the witness MacDonald was recalled by the Government and testified that he "thought" that he had seen one Jerome Goldberg (a defendant named in the indictment and who had been recently apprehended) in the lobby of the St. Augustine National Bank, where he was employed as vault custodian as aforesaid, in the company of petitioner. Said witness admitted on cross-examination that he had not seen said Jerome Goldberg and your petitioner in conversation together, or otherwise remaining in each other's company, during the time which he claimed they were at said bank, and further admitted that he had not seen your petitioner and said Jerome Goldberg leave the bank together.

11. That after said hearing on the 12th day of May, 1934, an application was made on behalf of your petitioner for the issuance of a commission to take the testimony of the said Jerome Goldberg. This application was granted. Irving D. Laudeutcher, Esq., an attorney, who had interviewed the deposition, testified at a hearing held before [fol. 7] the Commissioner on or about the 19th day of June, 1934, that he had been advised by the said Jerome Goldberg

in the presence of an agent of the Department of Justice that he would refuse to make any statement with respect to the matters upon which he was to be interrogated because of the pendency of his trial, and that the said Jerome Goldberg had stated to the said Irving D. Laudeutcher, Esq., that to his knowledge the petitioner was not involved in any manner, shape or form in the commission of the offenses alleged in the indictment.

12. That your petitioner was recalled as a witness in his own behalf and testified without contradiction that he had not visited the St. Augustine National Bank, in St. Augustine, Florida, in the company of the aforementioned Jerome Goldberg, and that he had never been at or near said bank at any time in the company of said Jerome Goldberg.

13. That no evidence of any kind or nature was adduced by the Government showing or tending to show that your petitioner was implicated in any way in the commission of any of the offenses charged in the indictment, or that there was probable cause to believe that he was guilty of the commission of such crimes as were charged in the indictment, so as to warrant the removal of your petitioner from the Southern District of New York to the Southern District of Florida. That all of the evidence adduced by your petitioner, including his own testimony, the testimony of petitioner's wife, the testimony of character witnesses, and the [fol. 8] testimony contained in the depositions hereinabove referred to, overwhelmingly established the innocence of your petitioner.

14. The Government called a rebuttal witness, one Roger Main, Special Agent of the Department of Justice, who testified that in conversations had with one David Chadwick and John Dixon, two of the defendants named in the indictment, who had theretofore testified in depositions taken that the petitioner was innocent of any wrongdoing, made statements to him inconsistent with and contradictory of the testimony given by each of these persons in the depositions referred to, that the said persons in substance stated to him that the petitioner was involved in the commission of the offenses charged in the indictment and had participated in their commission. This testimony was admitted over the objection and exception of counsel for petitioner.

15. That the testimony elicited from the said Special Agent Roger Main was incompetent and improper by reason of the fact that the same was hearsay and that no proper foundation had been laid therefor; and in that the attention of the witnesses stated by him to have made statements inconsistent with and contradictory of the testimony given by them upon the taking of their depositions as aforesaid was not called or directed to the time, place and circumstances under which the said alleged inconsistent and contradictory statements were made as is required by law.

16. That the testimony elicited from said Special Agent Roger Main was highly prejudicial to the rights of peti- [fol. 9] tioner, and the elicitation of such testimony adduced through Special Agent Roger Main was violative of petitioner's rights under the Constitution of the United States and Amendments thereto.

17. That the evidence adduced by your petitioner completely destroyed the presumption of probable cause emanating from the introduction into evidence of a certified copy of the indictment returned and filed in the United States District Court for the Southern District of Florida, and such evidence overwhelmingly established the innocence of your petitioner and the lack of probable cause to believe him guilty of the offenses charged in the aforementioned indictment.

18. That on or about the 26th day of June, 1934, the said Hon. Garrett W. Cotter, United States Commissioner, directed that your petitioner should be held in custody to await the further order of the United States District Court for the Southern District of New York for his removal to the Southern District of Florida, and thereupon your petitioner was remanded into the custody of the Hon. Raymond J. Mulligan, United States Marshal for the Southern District of New York, by whom your petitioner is now imprisoned and restrained of his liberty.

19. That the cause or pretense of petitioner's imprisonment and restraint, according to your petitioner's best information and belief, is by virtue of the ruling, finding and order of the said Commissioner directing the removal of petitioner to the Southern District of Florida.

[fol. 10] 20. Petitioner respectfully urges that the ruling, finding and order of the said United States Commissioner are contrary to law and violative of petitioner's constitutional rights for the reasons hereinabove stated.

21. That for the purpose of presenting the questions of law involved herein your petitioner begs leave to refer to the record of the proceedings before the said United States Commissioner, or a true copy thereof, to be produced on a hearing of this application, with the same force and effect as though hereto annexed and herein fully set forth at length.

Wherefore, your petitioner respectfully prays that a writ of habeas corpus issue herein directed to Hon. Raymond J. Mulligan, United States Marshal for the Southern District of New York, directing him and/or any of his deputies to have your petitioner before this Court at such time and place as this Honorable Court may direct, to the end that your petitioner may be dealt with according to law; and your petitioner further prays that a writ of certiorari issue herein, directed to Hon. Garrett W. Cotter, United States Commissioner for the Southern District of New York, commanding him to certify fully to the United States District Court for the Southern District of New York the aforementioned indictment and all the proceedings had before him and to return these proceedings and all papers, orders, briefs and evidence of every kind or nature and description had or used before him in said removal proceedings at such time and place as this Honorable Court may direct; and for such other, [fol. 11] further and different relief as to the Court may seem just and proper.

And your petitioner will ever pray.

Dated, New York, June 29, 1934.

Arthur Kassin, Petitioner. David P. Siegel, Attorney for Petitioner, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

(Verified by petitioner on June 29, 1934.)

IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS

The President of the United States of America to Honorable Raymond Mulligan, United States Marshal for the Southern District of New York, Greeting:

To Honorable Raymond Mulligan, United States Marshal for the Southern District of New York, Greeting:

You are hereby commanded to have the body of Arthur Kassin by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name he may be called in the same, before me or one of the Judges of the United States District Court for the Southern District of New York, in the United States Court and Post Office Building, located at Broadway and Park Row, in the Borough of Manhattan, City, County [fol. 12] and State of New York, in Room 331 thereof, on the 3rd day of July, 1934, at 10:30 o'clock in the forenoon, forthwith to do and receive what shall then and there be considered concerning said Arthur Kassin; and have you then and there this writ.

Witnesseth, Hon. John C. Knox, one of the Judges of the United States District Court for the Southern District of New York, the 29th day of June, 1934.

Charles Weiser, Clerk. (Seal)

Writ allowed June 29th, 1934.

Wm. Bondy, U. S. D. J.

IN UNITED STATES DISTRICT COURT

WRIT OF CERTIORARI

The President of the United States of America to the Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York, Greeting:

Whereas, we have understood from the petition of Arthur Kassin, this day filed in the office of the Clerk of the United States District Court for the Southern District of New York, and lately before you, a United States Commissioner, that said Arthur Kassin was held for removal to the Southern

District of Florida, and that you, said Commissioner, have committed the said Arthur Kassin to the custody of the [fol. 13] United States Marshal for the Southern District of New York, awaiting the further action of this Court;

And it further appearing that on this day of June, 1934, a writ of habeas corpus was duly issued herein, directing said Marshal to have said Arthur Kassin in the United States District Court for the Southern District of New York, in the United States Court and Post Office Building, located at Broadway and Park Row, in the Borough of Manhattan, City, County and State of New York, in Room 331, on the 3rd day of July, 1934, at 10:30 o'clock in the forenoon, to do and receive what shall then and there be considered concerning said Arthur Kassin; and we, being willing that all the proceedings concerning the custody and removal of the said Arthur Kassin before you remaining and thereto appertaining shall be certified and returned by you to said United States District Court for the Southern District of New York on the 3rd day of July, 1934, at 10:30 o'clock in the forenoon, in the United States Court and Post Office Building, located at Broadway and Park Row, in the Borough of Manhattan, City, County and State of New York, in Room 331.

Do command you that you certify and return into our United States District Court for the Southern District of New York, before one of our Judges thereof, at such time and place and Court, all the proceedings, including the information, indictments, testimony of all the witnesses by you heard, and all other records and proceedings concerning the said confinement and your said order in said removal proceedings had and taken by and remaining before you, so that our said Court may further act thereon as of right and [fol. 14] according to law ought to be done; and have you then and there this writ.

Witnesseth, Hon. John C. Knox, United States District Judge for the Southern District of New York, the 29th day of June, 1934.

Charles Weiser, Clerk. (Seal.)

Writ allowed June 29th, 1934.

Wm. Bondy, U. S. D. J.

IN UNITED STATES DISTRICT COURT—SOUTHERN DISTRICT OF NEW YORK

RETURN TO WRIT OF HABEAS CORPUS

Now to this Honorable Court comes Raymond J. Mulligan, United States Marshal for the Southern District of New York, and produces in open court the body and person of Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Stark, alias Archie Stone, alias Harry Stern, in obedience to the writ of habeas corpus issued out of this Court on the 29th day of June, 1934, requiring that the respondent have in Court on the 3rd day of July, 1934, at 10:30 o'clock in the forenoon, before one of the [fol. 15] Judges of the United States District Court for the Southern District of New York, at the Old Post Office Building, in the Borough of Manhattan, City, County and State of New York, Room 331, to do and receive what shall then and there be considered concerning the said Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern.

As and for a return to the said writ of habeas corpus, respondent alleges and respectfully shows to this Honorable Court as follows:

First: The respondent denies each and every allegation contained in the petition in support of the writ of habeas corpus, except that he admits the realtor was arraigned on the 4th day of April, 1933, before the Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York, on a complaint theretofore filed before the said Commissioner on the 27th day of March, 1933, by one J. L. Craven, Special Agent of the Department of Justice.

Second: That thereafter the Honorable Garrett W. Cotter took testimony and heard evidence and after the conclusion of the hearings before him the said United States Commissioner returned his decision holding that the petitioner should be committed for his removal to the Southern District of Florida.

Third: That the petitioner has been properly committed to the custody of the respondent by virtue of an order of

[fol. 16] commitment issued by Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York, on the 25th day of June, 1934.

Wherefore, respondent prays that the writ of habeas corpus herein be dismissed and that the petitioner, Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, be remanded to the custody of your respondent for removal to the Southern District of Florida, there to be dealt with according to law.

Dated, New York, N. Y., June 30, 1934.

Raymond J. Mulligan, United States Marshal.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF J. RANDALL CREEL

SOUTHERN DISTRICT OF NEW YORK, ss.:

J. Randall Creel, being duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Southern District of New York, and as such has charge of and is familiar with the proceedings herein; that he has read the foregoing return and knows the contents thereof [fol. 17] and that the same is true of his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

That the sources of your deponent's information and the grounds of his belief as to the matters herein set forth are a transcript of the proceedings held before the United States Commissioner in the above entitled action; a certified copy of the indictment filed in the District Court of the United States for the Southern District of Florida on the 28th day of January, 1933, in the case of United States of America versus Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, and others; a copy of the complaint sworn to before the United States Commissioner for the Southern District of New York on the 27th day of March, 1933, by J. L. Craven, Special Agent

of the Bureau of Investigation, Department of Justice; copies of the bench warrant issued against this defendant in the United States District Court for the Southern District of Florida, together with the non este return of the United States Marshal for that district; a temporary mittimus issued by the United States Commissioner for the Southern District of New York on the 19 day of June, 1934; the final commitment of the United States Commissioner for the Southern District of New York issued on the 26 day of June, 1934.

(Sworn to by J. Randall Creel on June 30, 1934.)

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

RETURN TO WRIT OF CERTIORARI

I, Garrett W. Cotter, United States Commissioner for the Southern District of New York, duly appointed according to law, do hereby certify:

First: That a certified copy of the indictment in the above matter is hereto annexed, the original having been found by the United States Grand Jury for the Southern District of Florida of the December Term thereof for the year 1932; that the same was marked in evidence before the United States Commissioner for the Southern District of New York at the hearing held in the above matter, being Government's Exhibit 5 in evidence in that proceeding.

Second: That annexed hereto is the testimony taken before me at the hearing in this matter and all other papers and documents and exhibits which were offered in evidence in the proceeding before me.

Third: That from the above mentioned testimony and exhibits I found the petitioner was the identical person mentioned in the indictment. I found further that there was probable cause to believe that he committed the offense with which he is charged. I further found that the indictment charged an offense against the United States and that the Court of the District to which removal was sought has jurisdiction to try the petitioner for the offense charged.

Given under my hand and seal this — day of June, 1934.

Garrett W. Cotter, United States Commissioner for the Southern District of New York.

[fol. 19] INDICTMENT

In the District Court of the United States of America in and for the Southern District of Florida, December Term Thereof, A. D. 1932, Held at Jacksonville, Florida.

First Count

SOUTHERN DISTRICT OF FLORIDA, ss:

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Southern District of Florida, upon their oaths present:

That Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of November, A. D. 1931, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, in the Florida National Bank of Jacksonville, which said bank throughout said period of time in said District was a banking corporation theretofore organized and existing under and by virtue of the laws of the United States, was engaged in and doing a banking business at Jacksonville, Florida, and was a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by the Federal Reserve Bank Organization Committee in Federal Reserve District Number 6; that the said Julius L. Chadwick, throughout said period of time and by virtue of his employment in said bank as aforesaid, had and possessed a power and authority over the banking transactions of said member bank as would enable him to commit the offense of unlawfully, wrongfully and wilfully misapplying the moneys, funds and credits of said member bank; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 1st day [fol. 20] of November, A. D. 1931, the real and exact date which being to the grand jurors unknown, and from said date and continuously at all times thereafter up to and including the 13th day of May, A. D. 1932, at Jacksonville, Florida, in the Southern District of Florida and within the jurisdiction of this Court, and at divers other places in this District, to the grand jurors unknown, the said Julius L. Chadwick, then and there being an employee, to wit, a bookkeeper of said member bank as aforesaid, and Leo Grom-

becker, alias Leo Carr; alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Harold Philipps; alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Klotson, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, hereinafter called defendants, did unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together to commit certain offenses against the United States, that is to say, the said defendants and each of them, then and there well knowing all the premises aforesaid, and that the said Julius L. Chadwick was an employee, to wit, a bookkeeper in the said member bank, and that he possessed [fol. 21] a power and authority over the banking transactions of said member bank as would enable him to wilfully misapply the moneys, funds and credits of said member bank, and with the intent then and there on the part of the said defendants and each of them to injure and defraud the said member bank and without the authority, knowledge or consent of said member bank or of any of its officers or directors, unlawfully, knowingly and feloniously would wilfully misapply certain of the moneys, funds and credits of the said member bank in the amount and of the value of, to wit, One hundred thirty-one thousand four hundred twenty-six dollars ($131,426.00), a description of the various kinds of moneys, funds and credits making up the said amount being to the grand jurors unknown, by paying and causing to be paid out of the moneys, funds and credits of the said member bank and converting and causing to be converted to the use, benefit and advantage of the said defendants and each of them, and of divers other persons to the grand jurors unknown, and not the use, benefit or advantage of the said member bank, the said amount of the moneys, funds and credits of said member bank, by means of certain falsely made and forged checks drawn upon the

account of Almours Securities, Inc., a corporation and a depositor in said member bank, the said defendants and each of them then and there well knowing the said checks would be forgeries and not true and genuine checks of the said Almours Securities, Inc., and then and there well knowing that they, the said defendants, and each of them would not be entitled to receive said amount or any part [fol. 22] thereof from the moneys, funds and credits of said member bank, the said acts being then and there unlawful and prohibited, and in violation of the provisions of Title 12, United States Code, Section 592, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That the said conspiracy, combination, confederation and agreement between the said defendants was continuously throughout all of the time from and after, to wit, the 1st day of November, A. D. 1931, and at all times thereafter and herein mentioned and referred to, and particularly at the time and times of the commission and consummation of each and all the overt acts in this indictment set forth, up to and including the 13th day of May, A. D. 1932, in existence and process of execution; against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof, the said defendants did do and commit many overt acts, among which were the following:

1. On, to wit, the 15th day of January, A. D. 1932, at Jacksonville, Florida, in the said Southern District of Florida, the defendant Julius L. Chadwick did abstract and take from the records of the Florida National Bank of [fol. 23] Jacksonville, a certain check drawn upon the account of Almours Securities, Inc., and signed by Edward Ball, vice-president of said Almours Securities, Inc.

2. On, to wit, the 1st day of April, A. D. 1932, the defendant Leo Grombecker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce, proceeded to the George Washington Hotel in the City of Jacksonville, Florida, in said Southern District of Florida, and registered under the name of Lawrence Kolmer, Washington, D. C.

3. On, to wit, the 2nd day of April, A. D. 1932, the defendant Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips, alias Robert L. Bernstein, proceeded to the George Washington Hotel in the City of Jacksonville, Florida, in said Southern District of Florida, and there registered under the name of Edward Welch, Boston, Mass.

4. On, to wit, about the 13th day of April, A. D. 1932, the said defendant Leo Grombecker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce, proceeded to the City of Atlantic Beach in Duval County, Florida, and in said Southern District of Florida, and occupied a certain building known as the Beachcrest Cottage.

[fol. 24] 5. On, to wit, the 14th day of April, A. D. 1932, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, proceeded to the Casa Marina Hotel at Jacksonville Beach, in Duval County, Florida, in said Southern District of Florida, and there registered under the name of Joe Duffin.

6. On, to wit, the 21st day of March, A. D. 1932, the defendant Joseph Kramer, alias Joe Duffin, alias Richard Gillman, alias Charles B. Davis, opened up an account with The Barnett National Bank of Jacksonville, Florida, at Jacksonville, Florida, in said Southern District of Florida, under the name of Richard Gillman, and then and there made a deposit in said account of $750.00 in currency.

7. On, to wit, the 5th day of April, A. D. 1932, at Jacksonville, Florida, in said Southern District of Florida, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, deposited in his account under the name of Richard Gillman at The Barnett Na-

tional Bank of Jacksonville, at Jacksonville, Florida, a certain forged check in the amount of $3,645.00, drawn upon the account of the Almours Securities, Inc., in the Florida National Bank of Jacksonville, at Jacksonville, Florida.

8. On, to wit, the 11th day of April, A. D. 1932, at Jacksonville, Florida, in said Southern District of Florida, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, deposited in his account under the name of Richard Gillman at The Barnett Na-
[fol. 25] tional Bank of Jacksonville, at Jacksonville, Florida, a certain forged check in the amount of $5,220.00, drawn on the account of the Almours Securities, Inc., in the Florida National Bank of Jacksonville, at Jacksonville, Florida.

9. On, to wit, the 15th day of April, A. D. 1932, at Jacksonville, Florida, in said Southern District of Florida, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, deposited in his account under the name of Richard Gillman at The Barnett National Bank of Jacksonville, at Jacksonville, Florida, a certain forged check in the amount of $6,542.00, drawn on the account of the Almours Securities, Inc., in the Florida National Bank of Jacksonville, at Jacksonville, Florida.

10. On, to wit, the 9th day of May, A. D. 1932, at Jacksonville, Florida, in said Southern District of Florida, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, deposited in his account under the name of Richard Gillman, at The Barnett National Bank of Jacksonville, at Jacksonville, Florida, a certain forged check in the amount of $7,622.00, drawn upon the account of the Almours Securities, Inc., in the Florida National Bank of Jacksonville, at Jacksonville, Florida.

11. That on, to wit, the 11th day of May, A. D. 1932, at Jacksonville, Florida, in said Southern District of Florida, the defendant Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis, deposited in his account under the name of Richard Gillman at The Barnett Na-
[fol. 26] tional Bank of Jacksonville, at Jacksonville, Florida, a certain forged check in the amount of $6,840.00, drawn upon the account of the Almours Securities, Inc., in the Florida National Bank of Jacksonville, at Jacksonville, Florida.

12. On, to wit, the 2nd day of April, 1932, the defendant Jeriham Seeman, alias Jack Seiman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice, proceeded to Jacksonville, Florida, and registered at the Mayflower Hotel, Jacksonville, Florida, as John Burtone, Washington, D. C.

13. On, to wit, the 15th day of April, 1932, the defendant Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice, and the defendant Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips, registered at the Monston Hotel, St. Augustine, Florida, under the names of T. H. Rice, Washington, D. C., and Harold Phillips, Boston, Mass.

14. On, to wit, the 14th day of April, 1932, the defendant Jeriham R. Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice, and the defendant Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Phillips, alias Harold Phillips, rented a safe deposit box at the St. Augustine National Bank, St. Augustine, Florida, under the names of Harold Phillips and T. H. Rice.

15. On, to wit, the 1st day of April, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias [fol. 27] Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, proceeded to Jacksonville, Florida, and registered at the George Washington Hotel, Jacksonville, Florida, under the name of Arthur Stern, Philadelphia, Penna.

16. On, to wit, the 24th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Casa Marina Hotel, Jacksonville Beach, Florida, under the name of Arthur Starke, Washington, D. C.

17. On, to wit, the 27th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Monson Hotel, St. Augustine, Florida, as Arthur Starke, Washington, D. C.

18. On, to wit, the 30th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin,

alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, under the name of Arthur Starke, rented a safe deposit box at the St. Augustine National Bank, St. Augustine, Florida.

19. On, to wit, the 10th day of May, 1932, the defendant Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, rented a safe deposit box at the St. Augustine National Bank, St. Augustine, Florida, under the name of E. Livington.

[fol. 28] 20. On, to wit, the 20th day of May, 1932, the defendant Edwin Livington, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, registered at the Atlantic Beach Hotel, Atlantic Beach, Florida, under the name of Edwin Livingston, Boston.

Against the peace and dignity of the United States, and contrary to the form of the statutes of the same in such case made and provided.

Second Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, in The Florida National Bank of Jacksonville, which said bank throughout said period of time in said District was a banking corporation theretofore organized and existing under and by virtue of the laws of the United States of America, was engaged in and doing a banking business at Jacksonville, Florida, and was a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by the Federal Reserve Bank Organization Committee in Federal Reserve District Number 6; that the said Julius L. Chadwick, by virtue of his employment in said bank as aforesaid, had and possessed a power and authority over the banking transactions of the said member bank, as enabled him to commit the offense in this count of this indictment charged against him; that the said Julius L. Chadwick then and there being an employee of said member [fol. 29] bank as aforesaid, on, to wit, the 5th day of April,

A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida and within the jurisdiction of this Court, with intent then and there on the part of him, the said Julius L. Chadwick, to injure and defraud the said member bank and without the authority, knowledge, or consent of said member bank or its officers or directors, and well knowing all the premises aforesaid, unlawfully, knowingly and feloniously did willfully misapply certain of the moneys, funds and credits of the said member bank in the amount and of the value of Three thousand seven hundred and sixty-three dollars ($3,763.00), a description of the various kinds of moneys, funds and credits making up the said amount being to the grand jurors unknown, by paying and causing to be paid out of the moneys, funds and credits of said member bank and converting and causing to be converted to the use, benefit and advantage of Leo Grombecker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welsh, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose [fol. 30] real and true names are to the grand jurors unknown, and not to any use, benefit or advantage of the said member bank, the said amount of Three thousand seven hundred and sixty-three dollars ($3,763.00), which said amount was paid out of the moneys, funds and credits of the said member bank for and in payment of a certain falsely made and forged check in the amount of Three thousand seven hundred and sixty-three dollars ($3,763.00), drawn upon the account in said member bank of the Almours Securities, Inc., a corporation and a depositor in said member bank, a better description of which is to the grand jurors unknown, and which said check was and is a forgery and not a true and genuine check of the said Almours Securities, Inc., a corporation, and a depositor in

said member bank, all of which he, the said Julius L. Chadwick, then and there well knew; that the said Julius L. Chadwick at the time of so misapplying the said moneys, funds and credits of the said member bank, well knew that the said amount of Three thousand seven hundred and sixty-three dollars ($3,763.00) should not have been paid for and in payment of said check, and that the said member bank would, as it in fact thereupon did, wholly lose said amount in consequence of such misapplication aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the said 5th day of April, A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida and within the jurisdiction of this Court, Leo Grombecker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, [fol. 31] alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welsh, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, and each of them, then and there well knowing all the premises aforesaid, and with the intent then and there on the part of them and each of them to injure and defraud the said member bank, unlawfully, knowingly, wilfully and feloniously did aid and abet the said Julius L. Chadwick in so, as aforesaid, under the circumstances, in the manner, and by the means aforesaid, wilfully misapplying said moneys, funds and credits of the said member bank, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

[Third Count same as Second Count, except that it relates to April 6, 1932, and to a check in the amount of $3,645.00.

Fourth Count same as Second Count, except that it relates to April 12, 1932, and to a check in the amount of $5,220.00.

Fifth Count same as the Second Count, except that it relates to April 16, 1932, and to a check in the amount of $6,542.00.]

[fol. 32] Sixth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, in The Florida National Bank of Jacksonville, which said bank throughout said period of time in said District was a banking corporation theretofore organized and existing under and by virtue of the laws of the United States of America, was engaged in and doing a banking business at Jacksonville, Florida, and was a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by the Federal Reserve Bank Organization Committee in Federal Reserve District Number 6; that the said Julius L. Chadwick, by virtue of his employment in said bank as aforesaid, had and possessed a power and authority over the banking transactions of the said member bank, as enabled him to commit the offense in this count of this indictment charged against him; that the said Julius L. Chadwick then and there being an employee of said member bank as aforesaid, on, to wit, the 10th day of May, A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida and within the jurisdiction of this Court, with intent then and there on the part of him, the said Julius L. Chadwick, to injure and defraud the said member bank and without the authority, knowledge, or consent of said member bank or its officers or directors, and well knowing all the premises aforesaid, unlawfully, [fol. 33] knowingly and feloniously did wilfully misapply certain of the moneys, funds and credits of the said member bank in the amount and of the value of Seven thousand six hundred and twenty-two dollars ($7,622.00), a description of the various kinds of moneys, funds and credits

making up the said amount being to the grand jurors unknown, by paying and causing to be paid out of the moneys, funds and credits of said member bank and converting and causing to be converted to the use, benefit and advantage of him, the said Julius L. Chadwick, and to the use, benefit and advantage of Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, and not to any use, benefit or advantage of the said member bank, the said amount of Seven thousand six hundred and twenty-two dollars ($7,622.00), which said amount was paid out of the moneys, funds and credits of the said member bank for and in payment of a certain falsely made and forged check, in words and figures as follows:

[fol. 34] Almours Securities, Inc.

No. 3922.

Jacksonville, Fla., May 9, 1932.

Pay to the Order of Richard Gillman, $7,622.00.

Registered C-7890. $7,622 and 00 cents. Dollars.

To the Florida National Bank
63-5 Jacksonville, Florida.

Edward Ball,
Vice-Pres.

and which said check was and is a forgery and not a true and genuine check of the said Almours Securities, Inc., a corporation, and a depositor in said member bank, all of which he, the said Julius L. Chadwick, at the time of so misapplying the said moneys, funds and credits of the said member bank well knew that the said amount of Seven thousand six hundred and twenty-two dollars ($7,622.00)

should not have been paid for and in payment of said check, and that the said member bank would, as it in fact thereupon did, wholly lose said amount in consequence of such misapplication aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the said 10th day of May A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida, and within the jurisdiction of this Court, Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie [fol. 35] Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, and each of them, then and there well knowing all the premises aforesaid, and with the intent then and there on the part of them and each of them to injure and defraud the said member bank, unlawfully, knowingly, wilfully and feloniously did aid and abet the said Julius L. Chadwick in so, as aforesaid, under the circumstances, in the manner, and by the means aforesaid, wilfully misapplying said moneys, funds and credits of the said member bank; against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

Seventh Count same as the Sixth Count, except that it relates to May 12, 1932, and to a check in the amount of $6,840.00.

Eighth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That the said Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the pe-

riod of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper in The Florida National Bank of Jacksonville, which said bank, throughout said period of time in said District, was a banking corporation theretofore organized and existing under and by virtue of the laws of the United States of America, was engaged in and [fol. 36] doing a banking business at Jacksonville, Florida, and was a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by the Federal Reserve Bank Organization Committee in Federal Reserve District Number 6; that the said Julius L. Chadwick, then and there being an employee of said member bank as aforesaid, on, to wit, the 1st day of May, A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida, and within the jurisdiction of this Court, with the intent then and there on the part of him, the said Julius L. Chadwick, to injure and defraud the said member bank and without the authority, knowledge or consent of said member bank or of its officers or directors, unlawfully, knowingly, wilfully and feloniously did make in a certain statement of the said member bank then and there in use by the said member bank in transacting its said banking business and then and there known and designated "Statement of the Account of Almours Securities, Inc.," a certain false entry under the headings so designated therein, in words and figures following, that is to say:

Date: Apr. 5, '32. New Balance: 655,817.65

and which said entry so made as aforesaid in said statemen then and there purported to show and did in substance, intent and effect, state and declare that on the 5th day of April, A. D. 1932, there was on deposit with said member bank and credited to the account of said Almours Securities, Inc., a corporation, and a depositor in said member bank, a balance in the sum of Six hundred fifty-five thousand eight hundred seventeen dollars and sixty-[fol. 37] five cents ($655,817.65) and the grand jurors aforesaid do further say that the said entry was and is false in this, that the balance on deposit and credited to the account of the said Almours Securities, Inc., in said member bank on the 5th day of April, A. D. 1932, was not the said sum of Six hundred fifty-five thousand eight hun-

dred seventeen dollars and sixty-five cents ($655,817.65), but was a smaller sum, to wit, the sum of Six hundred fifty-two thousand fifty-four dollars and sixty-five cents ($652,054.65), as he, the said Julius L. Chadwick, then and there, at the time and place of making said false entry in said statement as aforesaid, well knew that said entry was false as aforesaid, and thereby intended to injure and defraud the said member bank.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the said 1st day of May, A. D. 1932, at Jacksonville, Florida, in the said Southern District of Florida, and within the jurisdiction of this Court, Leo Grombecker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welsh, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rich; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias [fol. 38] Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Joie Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown; and each of them, then and there well knowing all the premises aforesaid, and with the intent then and there on the part of them and each of them to injure and defraud the said member bank, unlawfully, knowingly, wilfully and feloniously did aid and abet the said Julius L. Chadwick in so, as aforesaid, making said false entry in the said statement of the account of the said Almours Securities, Inc., a statement of the said member bank then and there in use by it in the transaction of its banking business; against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

Ninth Count same as the Eighth Count, except that it relates to a certain false entry in the statement of the account of Almours Securities, Inc., as follows:

Date Apr. 6, '32. New Balance, $289,607.87, the true balance being $282,199.87.

Tenth Count same as the Eighth Count, except that it relates to a certain false entry in the statement of the account of Almours Securities, Inc., as follows:

Date April 12, '32. New Balance, $1,471,192.98, the true balance being $1,440,881.97.

Eleventh Count same as the Eighth Count except that it relates to a certain false entry in the statement of the [fol. 39] account of Almours Securities, Inc., as follows:

Date Apr. 16, '32. New Balance, $1,400,682.11 the true balance being $1,350,628.11.]

Twelfth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, of The Florida National Bank of Jacksonville, in Jacksonville, Florida, which said bank throughout said period of time was a national banking association theretofore organized and established, and then and there existing and in operation and doing business in said District under and by virtue of the laws of the United States of America concerning national banks, and was then and there a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by The Reserve Bank Organization Committee, to wit, in Federal Reserve District No. 6; that said Julius L. Chadwick, by virtue of his employment as a bookkeeper of said member bank as aforesaid, then and there had and possessed a certain power and control over divers of the books and records of said member bank, and over divers of the financial transactions and business affairs thereof, which said power and control enabled him to commit the offense in this count of this indictment charged against him; and that the said Julius L. Chadwick, then and there being such employee of said mem- [fol. 40] ber bank as aforesaid, on, to wit, May 10th, A. D. 1932, at said City of Jacksonville, Florida, in the said South-

ern District of Florida, and within the jurisdiction of this Court, with intent then and there on the part of him, the said Julius L. Chadwick, to injure and defraud said member bank and to deceive the officers thereof, and without the authority of said member bank or its officers and directors, and well knowing all the premises aforesaid, unlawfully, knowingly, wilfully and feloniously did make and cause to be made, a certain false entry, as follows, to wit: "7,622.00—"; which said false entry was made in a book of said member bank, to wit, the Individual Ledger, and in an account in said book designated "Almours Securities, Inc.," and on a sheet of said account under the column headed "Checks in Detail," the purpose of which said column being to provide a convenient and proper place on said sheet in which to enter debit or charge items based upon the payment by said member bank of bona fide checks drawn by said Almours Securities, Inc., on said member bank, and properly chargeable against said account; and on the same line and to the right of the margin printed date "May 10'32"; and which said entry so made as aforesaid then and there purported to show and in substance and effect did indicate and declare that, on said May 10th, A. D. 1932, said member bank had paid out of its moneys, funds and credits a bona fide check drawn by said Almours Securities, Inc., on said member bank, in the sum of $7,622.00, thereby reducing the account of said Almours Securities, Inc., with said member bank in that sum, and which said entry when so made as aforesaid was then and there false and was then and there known by said Julius L. Chadwick to be false in this, that [fol. 41] said member bank had not on said day in fact so paid out of its moneys, funds and credits the said sum of $7,622.00 on any bona fide check drawn on said member bank by said Almours Securities, Inc., but that, as said Julius L. Chadwick then and there well knew, said entry was so made by reason of the fact that said member bank had paid out of its moneys, funds and credits on said day, without the knowledge, consent and authority of said Almours Securities, Inc., the sum of $7,622.00 on a forged and fictitious check purporting to have been signed and issued by said Almours Securities, Inc., and then and there known by said Julius L. Chadwick, when said entry was so made and caused to be made as aforesaid, to be forged and fictitious and not in truth and

in fact a proper item to be charged against said account; and that Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, with the same intents and knowledge on their part, [fol. 42] unlawfully, knowingly, wilfully and feloniously did aid and abet said Julius L. Chadwick in so doing: Against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

Thirteenth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Julius L. Chadwick, late of the City of Jacksonville, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, of The Florida National Bank of Jacksonville, in Jacksonville, Florida, which said bank throughout said period of time was a national banking association theretofore organized and established, and then and there existing and in operation and doing business in said District under and by virtue of the laws of the United States of America concerning national banks, and was then and there a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by The Reserve Bank Organization Committee, to wit, in Federal Reserve District No. 6; that said Julius L. Chadwick, by virtue of his employment as a bookkeeper of said member bank as aforesaid, then and there had and possessed a certain power and control over divers of the books and records of said member

bank, and over divers of the financial transactions and business affairs thereof, which said power and control enabled him to commit the offense in this count of this indictment charged against him; and that the said Julius L. Chadwick [fol. 43] then and there being such employee of said member bank as aforesaid, then and there, on said May 12th, A. D. 1932, with intent on his part then and there to injure and defraud said member bank and to deceive the officers and directors thereof, unlawfully, knowingly, wilfully and feloniously did make and cause to be made, in a certain book of said member bank, to wit, the Individual Ledger, a certain false entry, to wit, an entry which then and there purported to show and which then and there did in substance and effect indicate and declare that on said day the account of Almours Securities, Inc., in said Individual Ledger was entitled to be charged with the sum of $6,840.00, which said entry then and there, as the said Julius L. Chadwick then and there well knew, was and is wholly false, in that no financial transaction had then and there occurred to warrant the charging of that sum to said Almours Securities, Inc., or any sum; and that Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, with the same intents and knowl- [fol. 44] edge on their part, unlawfully, knowingly, wilfully and feloniously did aid and abet the said Julius L. Chadwick in so doing: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fourteenth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, of The Florida National Bank of Jacksonville, which said bank throughout said period of time in said District was a banking corporation theretofore organized and existing under and by virtue of the laws of the United States of America, was engaged in and doing a banking business at Jacksonville, Florida, and was a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by the Federal Reserve Bank Organization Committee in Federal Reserve District Number 6; that the said Julius L. Chadwick, by virtue of his employment in said bank as aforesaid, had and possessed a power and authority over the banking transactions of the said member bank, as enabled him to commit the offense in this count of this indictment charged against him; that the said Julius L. Chadwick, then and there being an employee of said member bank as aforesaid, on, to wit, the 7th day of May, A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida, and within the jurisdiction of this Court, with intent [fol. 45] then and there on the part of him, the said Julius L. Chadwick, to injure and defraud the said member bank and its officers and directors, and well knowing all the premises aforesaid, unlawfully, knowingly and feloniously and wilfully misapply certain of the moneys, funds and credits of the said member bank in the amount and of the value of Seven thousand nine hundred and fifty dollars ($7,950.00), a description of the various kinds of moneys, funds and credits making up the said amount being to the grand jurors unknown, by paying and causing to be paid out of the moneys, funds and credits of said member bank, and converting and causing to be converted to the use, benefit and advantage of him, the said Julius L. Chadwick, and to the use, benefit and advantage of Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Gold-

berg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Levingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, and not to any use, benefit and advantage of the said member bank, the said amount of Seven thousand nine hundred and fifty dollars ($7,950.00), [fol. 46] which said amount was paid out of the moneys, funds and credits of the said member bank for and in payment of a certain falsely made and forged check, in words and figures as follows:

Almours Securities, Inc. No. 3995

Jacksonville, Fla. May 5th 1932

Pay to the Order of John Dickson $7950.00

Registered C-7890 $7950 *and* 00 *cts* Dollars

To the Florida National Bank
63-5 Jacksonville, Florida

Edward Ball
Vice-Pres.

and which said check was and is a forgery and not a true and genuine check of the said Almours Securities, Inc., a corporation, and a depositor in said member bank, all of which he, the said Julius L. Chadwick, then and there well knew, that the said Julius L. Chadwick, at the time of so misapplying the said moneys, funds and credits of the said member bank, well knew that the said amount of Seven thousand nine hundred and fifty dollars ($7,950.00) should not have been paid for and in payment of said check, and that the said member bank would, as it in fact thereupon did, wholly lose said amount in consequence of such misapplication as aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that on, to wit, the said 7th day of May, A. D. 1932, at Jacksonville, Florida, within the said Southern District of Florida, and within the jurisdiction of

this Court, Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias [fol. 47] S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Diffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, and each of them, then and there well knowing all the premises aforesaid, and with the intent then and there on the part of them and each of them to injure and defraud the said member bank, unlawfully, knowingly, wilfully and feloniously did aid and abet the said Julius L. Chadwick in so, as aforesaid, under the circumstances, in the manner, and by the means aforesaid, wilfully misapplying said moneys, funds and credits of the said member bank: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fifteenth Count same as the Fourteenth Count, except that it relates to misapplication of a check of $8,850.00, dated May 6, 1932.

Sixteenth Count same as the Fourteenth Count, except that it relates to the misapplication of a check in the sum of $7,210.00, dated May 9, 1932.

[fol. 48] Seventeenth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, of The Florida National Bank of Jacksonville, in Jacksonville, Florida, which said bank throughout said period of time was a national banking association theretofore organized and estab-

lished, and then and there existing and in operation and doing business in said District under and by virtue of the laws of the United States concerning national banks, and was then and there a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by The Reserve Bank Organization Committee, to wit, in Federal Reserve District No. 6; that said Julius L. Chadwick, by virtue of his employment as a bookkeeper of said member bank as aforesaid, then and there had and possessed a certain power and control over divers of the books and records of said member bank, and over divers of the financial transactions and business affairs thereof, which said power and control enabled him to commit the offense in this count of this indictment charged against him; and that the said Julius L. Chadwick, then and there being such employee of said member bank as aforesaid, on, to wit, May 9th, A. D. 1932, at Jacksonville, Florida, and within the jurisdiction of this Court, with intent then and there on the part of him, the said Julius L. Chadwick, to injure and defraud said member bank and to deceive the officers thereof, and without the authority of said member bank and its officers and [fol. 49] directors, well knowing all the premises aforesaid, unlawfully, knowingly, wilfully and feloniously did make and cause to be made, a certain false entry, as follows, to wit, "8,8500.—"; which said false entry was made in a book of said member bank, to wit, the Individual Ledger, and in an account in said book designated "Almours Securities, Inc.," and in the column thereof headed "Checks in Detail," the purpose of which said column being to provide a convenient and proper place on said sheet in which to enter debit or charge items based upon the payment by said member bank of bona fide checks drawn by said Almours Securities, etc., on said member bank, and properly chargeable against said account; and on the same line and to the right of the margin printed date "May 9'32"; and which said entry so made as aforesaid then and there purported to show and in substance and effect did indicate and declare that, on said May 9th, A. D. 1932, said member bank had paid out of its moneys, funds and credits a bona fide check drawn by said Almours Securities, Inc., on said member bank, in the sum of $8,850.00, thereby reducing the account of said Almours Securities, Inc., with said member bank in that sum, and which said entry when so made as aforesaid was then and there false and was then and there known by

said Julius L. Chadwick to be false in this, that said member bank had not on said day in fact so paid out of its moneys, funds and credits said sum of $8,850.00, on any bona fide check drawn on said member bank by said Almours Securities, Inc., but that, as said Julius L. Chadwick then and there well knew, said entry was so made by reason of the fact that said member bank had paid out of its [fol. 50] moneys, funds and credits on said day, without the knowledge, consent and authority of said Almours Securities, Inc., the sum of $8,850.00 on a forged and fictitious check purporting to have been signed and issued by said Almours Securities, Inc., and then and there known by said Julius L. Chadwick, when said entry was so made and caused to be made as aforesaid, to be forged and fictitious and not in truth and in fact a proper item to be charged against said account; and that Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Eward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E Livingston, alias Ike Kloston, alias Isadore Kotzen, alias I. Kotzen, whose real and true names are to the grand jurors unknown, with the same intents and knowledge on their part, unlawfully and feloniously did aid and abet said Julius L. Chadwick in so doing: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

[fol. 51] Eighteenth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Julius L. Chadwick, late of the City of Jacksonville, Florida, in said District, throughout the period of time from the 1st day of April, A. D. 1932, to and including the 13th day of May, A. D. 1932, was an employee, to wit, a bookkeeper, of The Florida National Bank of Jacksonville, in Jacksonville, Florida,

which said bank throughout said period of time was a national banking associatoin theretofore organized and established, and then and there existing and in operation and doing business in said District under and by virtue of the laws of the United States concerning national banks, and was then and there a member bank of the Federal Reserve Bank of Atlanta, Georgia, as designated by The Reserve Bank Organization Committee, to wit, in Federal Reserve District No. 6; that said Julius L. Chadwick, by virtue of his employment as a bookkeeper of said member bank as aforesaid, then and there had and possessed a certain power and control over divers of the books and records of said member bank, and over divers of the financial transactions and business affairs thereof, which said power and control enabled him to commit the offense in this count of this indictment charged against him; and that the said Julius L. Chadwick then and there being such employee of said member bank as aforesaid, then and there, on said May 10th, A. D. 1932, with intent on his part then and there to injure and defraud said member bank and to deceive the officers and directors thereof, unlawfully, knowingly, wilfully and feloniously did make and cause to be made, in a certain book of said member bank, to wit, the Individual [fol. 52] Ledger, a certain false entry, to wit, an entry which then and there purported to show and which then and there did in substance and effect indicate and declare that on said day the account of Almours Securities, Inc., in said Individual Ledger was entitled to be charged with the sum of $7,210.00, which said entry then and there, as the said Julius L. Chadwick then and there knew, was and is wholly false, in that no financial transaction had then and there occurred to warrant the charging of that sum to said Almours Securities, Inc., or any sum; and that Leo Grombecker, alias Leo Carr, alias The Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Harry Stern; Morris Gunst, alias Jole Goldman, and Edwin Livingston, alias E. Livingston, alias Ike

Kloston, alias Isadore Kotzen, alias I Kotzen, whose real and true names are to the grand jurors unknown, with the same intents and knowledge on their part, unlawfully and feloniously did aid and abet the said Julius L. Chadwick in so doing: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

(Sgd.) W. P. Hughes, United States Attorney.

[fol. 53] Endorsed on back:

A True Bill.

(Sgd.) W. M. Palmer, Foreman.

Filed in open Court this 28th day of January, A. D. 1933.

(Sgd.) Edwin R. Williams, Clerk.

Let capias for all except Julius L. Chadwick.

Leo. Grombecker and Joseph Kramer.

Bond $50,000.00 each for Jerome Goldberg, Jeriham Seeman, Archie Kassin, Morris Gunst and Edwin Livingston.

(Sgd.) Louis W. Strum, U. S. Dis. Judge.

[fol. 54] In United States District Court, Southern District of New York

Minutes of Hearing Before United States Commissioner

Before Garrett W. Cotter, Esq., United States Commissioner

New York, May 16, 1933, 3.30 P. M.

Appearances

George Z. Medalie, Esq., United States Attorney, for the Government; by Herbert Zelenko, Esq., Assistant United States Attorney.

David P. Siegel, Esq., attorney for the Defendant.

Offer in Evidence

Mr. Zelenko: The Government offers in evidence a certified copy of an indictment returned in the Southern Dis-

trict of Florida at the December Term, 1932, which term was held at Jacksonville, Florida, against the following defendants: Julius L. Chadwick; Leo Grombecker, alias Leo Carr, alias Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce; Jerome Goldberg, alias Edward Welch, alias Eddie Leland, alias Eddie Levine, alias Harold Philipps, alias Harold Phillips; Joseph Kramer, alias Richard Gillman, alias Joe Duffin, alias Charles B. Davis; Jeriham Seeman, alias Jack Seeman, [fol. 55] alias Jack Seiman, alias John Burtone, alias T. H. Rice; Archie Kassin, alias Archie Kassen, Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern.

The Commissioner: Is that the defendant?

Mr. Zelenko: That is the defendant.

The Commissioner: And others?

Mr. Zelenko: And others.

Mr. Siegel: This indictment is objected to upon the grounds, among others, that there is no connection shown between this indictment and the defendant and that there is no proper proof duly made that this is a truly authenticated copy and a truly certified copy of the indictment alleged to have been filed against the defendant Archie Kassin.

The Commissioner: It will be admitted.

(Marked Government's Exhibit 1.)

Mr. Siegel: May we have an exception?

Mr. Zelenko: Attached to this certified copy of the indictment is a capias and a non est return.

Mr. Siegel: That is not true. It is a capias pertaining to a different man; it does not pertain to this particular defendant. It pertains to a man by the name of Jack Seeman and not to this defendant. I renew my objection, your Honor.

The Commissioner: Is that true?

Mr. Siegel: It says so right on the paper.

Mr. Zelenko: The capias is for Jack Seeman, but for the purpose of this hearing at the present time the indictment is certified. It is only when we want to remove the defendant immediately after the hearing that we cannot use it. He cannot be moved on that capias. The capias has been at-

tached to the indictment and the indictment is certified. That is all we need for identification purposes.

[fol. 56] Mr. Siegel: Even the certification says that it does not pertain to us, it pertains to somebody else.

The Commissioner: The certification is as to the indictment.

Mr. Siegel: Against a different man. It does not certify that this is an indictment against us. The certification must be by the Clerk either that this is a certified copy against us before the statutory presumption follows. I would like to submit some cases on that, your Honor. I do not want a hasty decision here.

The Commissioner: I will admit the indictment in evidence.

Augustus O. MacDonnell, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Zelenko;

Q. Mr. MacDonnell, what is your occupation?

A. Vault Custodian of the St. Augustine National Bank, St. Augustine, Florida.

Q. How long have you been vault custodian of that bank?

A. Four years.

Q. Were you vault custodian of that bank during the month of April, 1932?

A. I was.

Q. Have you with you the original vault cards which I have subpoenaed?

A. I have.

Q. May I have those cards, please?

A. (Witness handed some cards to Mr. Zelenko.)

Q. When a person wishes to rent a box or vault in your bank, are you the person to whom they must apply?

A. I am.

Q. Must the person's signature appear upon the card that he signs?

A. Yes.

[fol. 57] Q. If that card is signed in your presence——

A. It is.

Q. No. If the card is signed in your presence, do you make a notation of any kind to show that it was signed in your presence?

A. I sign as a witness.

Q. Does your signature appear on the card that you now hold in your hand?

A. Yes.

Q. What kind of card is it?

A. That is a form of a lease leasing a safe deposit box for a year.

Q. Is that card a card used in the regular course of business of your bank?

A. Yes.

Q. Is that a regular business card?

A. It is.

Q. What is the name of the lessee which appears on that card?

A. Arthur Starke.

Q. Was that signature written in your presence?

A. It was.

Mr. Zelenko: I offer that card in evidence.

Mr. Siegel: That is objected to upon the ground that there is no connection shown between the card and this defendant, and as incompetent, irrelevant and immaterial.

The Commissioner: Mark it for identification at present.

(Card marked Government's Exhibit 2 for Identification.)

Q. If a lessee of a vault in your bank wishes to visit his vault, must he sign his name to a card known as a record card?

A. Yes.

Q. If you admit that party, do your initials appear upon the card alongside the signature of the lessee?

A. Yes.

Q. I show you this card and ask you whether this is a record of the calls of Arthur Starke?

A. It is.

[fol. 58] Q. Were you present at each one of those calls?

A. I was.

Q. Is that card a regular card used in the course of your business?

A. It is.

Q. Is that a regular record of your bank?
A. It is.

Mr. Zelenko: I want that card marked for identification.

(Card marked Government's Exhibit 3 for identification.)

Q. Were you a witness before the grand jury in Florida in this particular case?
A. I was.
Q. I want you to look about this room and see if you can identify for me a person known to you as Arthur Starke. You can walk through the aisles and touch the person.
A. (Witness walks up to a man and touched him.)

Mr. Zelenko: Will you please rise?

(A man stood up in the court room.)

Q. The person rising is the person known to you as Arthur Starke?
A. Yes.
Q. Was that the man who rented the box from you?
A. It was.
Q. Is that the man whose signature appears on the record card?
A. It is.
Q. Showing the number of calls?
A. Yes.

Mr. Zelenko: What is your name, please?
A Voice: Arthur Kassin.
Mr. Siegel: I ask to have that stricken out, your Honor.
The Commissioner: I will strike that out at the present time.

Mr. Zelenko: The Government now offers in evidence Exhibit 2 and Exhibit 3 for Identification.

[fol. 59] Mr. Siegel: I understand they are offered separately. Aren't they?
Mr. Zelenko: Separately.
Mr. Siegel: I object to the introduction in evidence of Exhibit 2 for Identification on the ground that it is incompetent, irrelevant and immaterial to the matter now pending before your Honor.
The Commissioner: Objection overruled.
Mr. Seigel: Exception.

(Government's Exhibit 2 for Identification received in evidence.)

Mr. Siegel: We make the same objection to Government's Exhibit 3 for Identification.

The Commissioner: The same ruling.

Mr. Siegel: Exception.

(Government's Exhibit 3 for Identification received in evidence.)

Q. When you testified before the grand jury in Florida in this case did you have a mental picture in your mind of the man known to you as Arthur Starke?

A. I did.

Mr. Siegel: I object to that, whether he had a mental picture in his mind.

Q. Did you know a man named Arthur Starke when you testified before the grand jury?

A. I knew the man that signed that card, the Artnur Starke.

Q. The Arthur Starke that you knew was the man who rented the box from you?

A. That is right.

Q. And the man whom you have just pointed out as being Arthur Starke, who rented the box from you?

A. Yes, the same man.

[fol. 60] Cross-examination.

By Mr. Siegel:

Q. Now, looking at the District Attorney as you are, can you tell me the weight of the Arthur Starke that you had in mind? How much did he weigh?

A. Well, I guessed he weighed about 160 pounds.

Q. Can you tell me what his height was?

A. About 5 feet 6.

Q. Can you tell me what the color of his eyes were?

A. They were gray, as I remember, as I recall.

Q. Can you tell me what his age was?

A. About thirty-two or thirty-three.

Q. Was the vault opened in your presence subsequently?

A. I don't understand.

Q. Was the vault opened in your presence?

A. You mean the particular vault that he rented?

Q. Yes.

A. Why, yes, I always prime the lock in order for the customer to get it.

Q. What did you find in the vault?

A. I didn't look in his box. We don't do that.

Q. Did you testify before one grand jury or several grand juries down in Jacksonville, Florida?

A. One grand jury.

Q. Do you know what month in the year that was?

A. I think it was in May.

Q. In May, 1931?

A. 1932.

Q. In May, 1932. You never testified after that before another Federal grand jury, did you?

A. No, only once.

Q. You are sure that that was in May?

A. No, I am not positive.

Q. You just stated a minute ago it was in May.

A. I didn't say——

Q. I mean around May.

Mr. Zelenko: Please let him finish the answer.

[fol. 61] The Commissioner: It is cross-examination.

Mr. Zelenko: He can let the witness answer the question.

Q. It was about May, wasn't it?

A. No, I am mistaken about that. I had something else in mind.

Q. What did you have in mind?

A. That I was questioned by a detective agency shortly after last May.

Q. Well, you say you were questioned by some detective agencies?

A. Yes.

Q. When was that?

A. That was in May, last May.

Q. Yes, last May, 1932; is that it?

A. Yes.

Q. How long was it after they examined you that you appeared before the grand jury?

A. Well, it was during the trial of Leo Carr and Chadwick.

Q. When was that?

A. About three or four months ago. I don't recall just exactly.

Q. So that you testified before the Federal grand jury during the time that Carr was being tried, and that was about three or four months ago?

A. Yes, that is my recollection.

Q. You never testified before any Federal grand jury prior to that time that Carr was put on trial down in Florida; is that right?

A. No. That is right.

Q. That was the only Federal grand jury before whom you testified?

A. Yes.

Mr. Siegel: That is all.

[fol. 62] GENE ZAPF, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Zelenko:

Q. Mr. Zapf, what is your occupation?

A. I am manager of a hotel.

Q. What hotel?

A. Casa Marina Hotel, Jacksonville Beach.

Q. How long have you been manager of that hotel?

A. I opened—going on eight years; seven years, to be exact.

Q. Were you the manager of that hotel during 1932?

A. Yes, sir.

Q. Pursuant to subpœna, did you bring a record card of a certain guest at your hotel?

A. Yes, sir.

Q. May I have that card, please?

A. (Witness handed a card to counsel.)

Q. This card, No. 1408, what does it purport to be?

A. Well, it is a registration card and also an account card.

Mr. Siegel: I object to what it purports to be. It is a card not in evidence.

The Commissioner: Well, he may describe it.
Mr. Siegel: Exception.
Mr. Zelenko: I withdraw that question.

Q. Is this card that I hold in my hand, which you have just given me, a regular registration card showing the registration of a guest in your hotel on April 24, 1932?
A. Yes, sir.

Mr. Siegel: Objected to. The paper speaks for itself. Exception.
The Commissioner: Mark it for identification.

(Card marked Government's Exhibit 4 for Identification.)

[fol. 63] Q. Now, did a person known to you as Arthur Starke register at your hotel on April 24, 1932?
A. Yes, sir.
Q. Is Government's Exhibit 4 for Identification his registration card?
A. That is the card.

Mr. Siegel: Objected to.

By the Commissioner:

Q. Is that his signature?
A. He signed it in front of me.
Q. Does his signature appear on there?
A. Yes, sir; right there, "Arthur Starke."
Q. Did you see him write it?
A. Yes, sir.
Q. Do you know where he is now?

By Mr. Zelenko:

Q. Can you walk through this room and pick out the person known to you as Arthur Starke? Walk through the room.

Mr. Siegel: Not based on what was said here; not based on what happened.
The Commissioner: He did not know. He wasn't here.
Mr. Siegel: He was sitting in the front seat.
The Commissioner: Let him pick him out. He may not be able to pick him out.

A. (Witness walked around the room and touched a man.) Here is Mr. Starke (indicating).

Q. Will you put your finger on that man?

A. (Witness touched a man.)

By the Commissioner:

Q. Did you see the other man point him out?

A. No, sir.

[fol. 64] By Mr. Siegel:

Q. Were you in the court room?

Mr. Zelenko: Please let me finish my question, then you can cross-examine.

The Commissioner: That is all right. Let us go easy.

Mr. Zelenko: Will the person who was just pointed to stand up, please?

(A man stood up in the court room.)

By Mr. Zelenko:

Q. Now, you say that man is known to you as Arthur Starke?

A. Yes, sir.

Q. Was he known to you as Arthur Starke before you got into the court room just now?

A. That is the only name ever I knew him by.

Q. Before you got in the court room did you see him to-day?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in the subway.

Q. Did you go over to him or did he go over to you?

A. Well, we came out of the subway. He came up to me.

Q. What did he do?

A. He wanted to shake hands with me.

Q. This same man that you have just pointed to?

A. Yes, sir.

Q. Was that man known to you as Arthur Starke?

A. Yes, sir.

Q. The man that you saw in the subway and the man that you pointed to just now is known to you as Arthur Starke?

A. Yes, sir.

Q. He is the man whose signature appears on Government's Exhibit 4 for Identification?

A. Yes, sir.

[fol. 65] Mr. Zelenko: I offer that in evidence.

Mr. Siegel: Objected to as incompetent, irrelevant and immaterial.

The Commissioner: It will be admitted.

Mr. Siegel: Exception.

(Government's Exhibit 4 for Identification received in evidence.)

Mr. Zelenko: That is all for this witness.

Q. Did you appear before the grand jury?

A. No, sir.

Mr. Siegel: No cross-examination.

Mr. Zelenko: That is all for the Government.

The Commissioner: The Government rests.

Mr. Siegel: I move to dismiss. We rest also. I ask your Honor for a week in which to file a brief in this case.

The Commissioner: The Government may later on ask for permission to introduce in evidence the capias and the non est of this particular man.

Mr. Siegel: If they do that, we should be permitted to put in any defense that is necessary.

Mr. Zelenko: In order to obviate all the difficulties, the Government does not rest, but requests an adjournment.

Mr. Siegel: Well, Mr. Zelenko has been very fair to me. If he wants an adjournment, I do not see why I should refuse it. I suggest that the matter be put over, in the meantime, for about two weeks, your Honor.

The Commissioner: All right, two weeks; to the 29th of May at 11 o'clock.

(Discussion off the record.)

[fol. 66] Cross-examination.

By Mr. Siegel:

Q. When you met this man—in the subway, was it?

A. To-day?

Q. Yes, sir.

Mr. Siegel: Could we ask this other gentleman to step outside a minute, please, if he doesn't mind?

Q. (Continuing:) —were you with another gentleman?
A. I was there with two more gentlemen.
Q. One of the men is the man that went outside of this room?
A. Yes, sir.

By the Commissioner:

Q. Is the other man in the room?
A. Yes, sir.
Q. Is he in here now?
A. Yes, sir.

The Commissioner: Let him step outside.

By Mr. Siegel:

Q. What were the names of the two men that were with you in the subway?
A. Mr. MacDonnell and Mr. MacLaird.
Q. They are both from back home?
A. One from St. Augustine, one from Jacksonville.
Q. Now, when this man came up to you, exactly what did he say to you?
A. I said I didn't know him.
Q. You said you didn't know him?
A. I said, "I don't know you." That is the very words I used.
Q. As a matter of fact, you did know him?
A. Why, certainly I did know him, but I was instructed not to talk to anybody and I wasn't going to talk to anybody.
Q. But you did say, "I don't know you"?
A. Yes, sir.
[fol. 67] Q. At that time you were with these other two men?
A. Yes, sir.
Q. Your exact words to him were, "I don't know you"?
A. Yes, sir.

Mr. Siegel: That is all.

Redirect examination.

By Mr. Zelenko:

Q. Did you really know him?
A. Yes, sir.

Q. Did I instruct you not to talk to anybody in this city?
A. You told me not to talk to anybody with reference to this case, which I didn't.
Q. When that man walked over to you, that was the man you saw in this court room?
A. Yes, sir.
Q. Why did you say to him, "I don't know you"?
A. Because I was instructed not to talk to anybody about this case.

Recross-examination.

By Mr. Siegel:

Q. But you did say to him, "I don't know you"?
A. Yes, sir.
Q. He said, "Hello"?
A. Yes, sir.
Q. You said, "I don't know you"?
A. Yes.
Q. Since that time have you been in the company of a Department of Justice agent, Mr. Keating?
A. Well, I have been off and on with him all the time.
Q. You have been with him from time to time, haven't you?
A. I sure have.
Q. Has he shown you these pictures of this defendant (indicating)?
A. He showed it to me yesterday.
Q. And he said, "That is the fellow," did he?
A. No, he said could I identify him.
Q. That is what I mean.

[fol. 68] Mr. Zelenko: Let him finish, please. He is telling you now.

Q. Your own language. Finish it.
A. He asked me could I identify him. I says, "Yes."
Q. And he showed you the picture?
A. That is right.
Q. You said sure, you could identify him, didn't you?
A. No. I picked him out as soon as I saw the picture.
Q. He showed you this picture, didn't he?

A. Yes. I seen it many a time; not only Mr. Keating, but I saw the picture lost of times.

Q. He showed you one picture, didn't he, of this man?

A. Yes.

Q. That is when you identified him; is that right?

A. Yes.

Q. When was that?

A. That was yesterday morning.

Q. When was it you saw this same man in the subway?

A. I could not tell you exactly the time, but it was around lunchtime.

Q. Was it after that incident of the picture?

A. Yes.

Q. To-day you sat in the first chair in this room?

A. Yes, sir.

Q. Facing the Commissioner?

A. Yes, sir.

Q. Facing the District Attorney?

A. Yes, sir.

Q. Facing me; is that right?

A. Yes, sir.

Q. As you sat there, the first witness that was called was Mr. MacDonnell?

A. That is right.

Q. And you were less than 10 feet away from him; is that right?

A. Yes, sir.

Q. Listening to every word he had to say?

A. Yes.

Q. Did you hear him asked to point out this man Arthur Starke?

A. I heard him——

[fol. 69] Q. The District Attorney asked him to point out Arthur Starke; is that right?

A. That is right.

Q. You saw him walk right behind you?

A. I saw him walk behind me, yes.

Q. You saw him walk behind you and you know he picked out Arthur Starke, did you?

A. I presume he did.

Q. Did you hear the District Attorney ask a man to stand up?

A. Yes.

Q. That was all before you testified?
A. Yes, sir.
Q. You heard this man identified as Arthur Starke, didn't you?
A. Yes.
Q. Then afterwards to-day you identified Arthur Starke; is that right?
A. Yes, sir.

Mr. Siegel: That is all.

By Mr. Zelenko:

Q. When you were shown the picture in my office was any name mentioned to you as you were handed the picture?
A. No, sir.
Q. Were you told that the man whose picture appeared thereon was Arthur Starke?
A. Now, I don't know how to answer that. I looked at the picture and Arthur Starke was the man that was on my registration card, and I said, "That is Arthur Starke."
Q. Did I tell you that that was Arthur Starke whose picture was there?
A. No.
Q. Did Mr. Keating tell you that?
A. Yes, sir.
Q. Did anybody tell you that?
A. Yes, sir.
Q. Did you know that of your own mind and memory?
A. I sure did.
Q. When Mr. MacDonnell went to point out Arthur Starke did you turn around to see who he was pointing to?
A. No, sir.
[fol. 70] Q. Did you know Arthur Starke without seeing what Mr. MacDonnell was doing?
A. Yes, sir.
Q. Was Mr. MacDonnell with you in the subway at lunchtime when Starke came up to you?
A. Yes, sir.

By Mr. Siegel:

Q. How many times have you been shown a picture of Arthur Starke? Be fair about it, now.
A. It is not for me to tell up a story now.

Mr. Zelenko: The government objects to counsel asking the witness to be fair. As long as he is truthful, we do not need any further characterizations.

The Commissioner: Let him cross-examine him. Give him a little leeway.

Q. How many times have you been shown the picture?

A. Once besides yesterday.

Q. When was that?

A. That was—I could not tell you the exact date because I don't know.

Q. About?

A. Well, I presume right after he was arrested.

Q. Would you say a year?

A. I am not going to say, because I don't know.

Q. I mean, just fix the time in your own way.

A. I am not going to do that.

By the Commissioner:

Q. Approximately. Is it six months or seven months or five months, as nearly as you can tell. We are not pinning you down. You can say it was a year or six months.

A. It seems to me it was right after he was arrested here.

Q. When was that?

A. I would hate to say exactly.

[fol. 71] Q. Was it within a year?

A. Oh, yes, it was within this past year.

The Commissioner: That is enough.

By Mr. Siegel:

Q. Mr. Ball is the president of that bank down there?

A. Yes, sir.

Q. Do you know him very well?

A. Just to speak to him.

Q. He is a powerful man down that way?

Mr. Zelenko: The Government objects to it.

Q. He is a powerful man down that way?

A. Well, I couldn't tell you. I know he has got a lot of money.

Q. He is a very influential man in St. Augustine, Florida?

A. I could not say whether he is or not. I know he is head of that bank.

By the Commissioner:

Q. Where are you from? Jacksonville?

A. I am from the Beach, about twenty miles from Jacksonville.

Q. This man that you are speaking about is from Jacksonville?

A. Yes, he is from Jacksonville.

AUGUSTUS O. MACDONNELL, recalled, testified further as follows:

By Mr. Zelenko:

Q. Mr. MacDonnell, were you in the subway this afternoon with Mr. Laird and Mr. Zapf?

A. I was.

Q. Did you see Starke come up to Mr. Zapf? Did you see Starke in the subway?

[fol. 72] Mr. Siegel: May he answer the question?

Mr. Zelenko: I withdraw the question.

Q. Did you see Starke in the subway?

A. I did.

Q. Is he the man that you identified in the court room?

A. He is.

Q. Did you have a conversation with Zapf after you were in the subway about whether he saw Starke or not and would not admit——

Mr. Siegel: I object to the conversation. It is not in the presence of this defendant.

Mr. Zelenko: The Government withdraws the question.

Cross-examination

By Mr. Siegel:

Q. Now, when this man was with you, this other witness, Mr. Zapf, did a man you knew at Starke say "Hello" to him?

A. I wasn't near enough to hear what was said. I saw them together.

Q. But you didn't hear anything that was said one way or another?

A. I got off the car last and I was too far away. With the noise, I could not hear. There were three of us together. I was the last one off and there were several people in between us.

Q. Weren't you there when this man Starke spoke to the witness just preceding you?

A. I was a few feet away, but I could not hear anything that was said.

Q. You can hear very well, can't you?

A. Oh, yes, but there was noise in the subway.

Q. Kind of noisy?

A. Yes.

Q. Just where was it that Mr. Starke shook hands with Mr. Zapf?

A. I couldn't tell you. I am a stranger in New York.

[fol. 73] Q. I mean, where in the car?

A. It wasn't in the car.

Q. In the subway train?

A. No, not in the train. We got out on the platform.

Q. You didn't hear what was said one to the other?

A. No.

Q. Anything at all?

A. I just saw Mr. Starke saying something. I saw his lips were moving. He apparently had his hand out in this position (indicating).

Q. You mean like shaking hands with him?

A. Yes.

Q. Did you hear anything that was said?

A. I did not hear a word.

Mr. Zelenko: Before the case is adjourned for the day, can we have a ruling on the identification, if the Court please?

Mr. Siegel: I object to that. I object to your Honor binding yourself, foreclosing yourself on that point.

The Commissioner: The only question you have in your mind is about bringing these witnesses back again?

Mr. Zelenko: Do you object to this picture being offered in evidence as of the man?

Mr. Siegel: I certainly object to a picture being offered in evidence.

AUGUSTUS O. MACDONNELL recalled.

By Mr. Zelenko:

Q. Was this picture shown to you in my office yesterday?

[fol. 74] Mr. Siegel: Objected to as incompetent, irrelevant and immaterial and as having no bearing on the issues in this case.

Mr. Zelenko: If counsel will concede——

The Commissioner: Can you better your case now with a photograph?

Mr. Zelenko: I am doing it for this purpose: If counsel will concede that the man who was identified by both witnesses in the court room is the man Arthur Kassin, the defendant in this case, I will not do it.

Mr. Siegel: I will not concede anything.

The Commissioner: I don't know whether you have established that or not, but the photograph will not do it.

Mr. Zelenko: Well, the Government contends that it had the right to ask the person who was pointed to what that person's name was, for the purpose of the record.

The Commissioner: He could be another Arthur Kassin. It has to be the Arthur Kassin mentioned in the indictment.

Mr. Zelenko: Therefore we can ask him what his name is.

The Commissioner: No, I do not think you have the right to ask the defendant anything.

Mr. Zelenko: I didn't know he was the defendant. For the purposes of this record, none of us know the defendant. Suppose it was a stranger who was identified by these people?

The Commissioner: He said his name was Arthur Kassin.

Mr. Zelenko: Your Honor struck it from the record?

The Commissioner: Certainly I did, because I did not wish you to ask the defendant anything. I want to give you every opportunity.

[fol. 75] Mr. Zelenko: That is all.

Mr. Siegel: I understand this is over for me to the 29th for all purposes?

Mr. Zelenko: Yes.

The Commissioner: What does the record show with regard to this man in the indictment?

Mr. Zelenko: The record shows that a man known as Arthur Starke by Mr. MacDonnell and by Mr. Zapf, the same man who registered at Mr. Zapf's hotel and who hired a vault at Mr. MacDonnell's bank, is the man pointed to in this court room and known by us as Arthur Kassin.

The Commissioner: Yes. Is he the Arthur Kassin mentioned in the indictment?

Mr. Zelenko: Suppose it was John Jones? That man was in Florida. He is known as Arthur Kassin.

The Commissioner: There are hundreds of men traveling in Florida—thousands.

Mr. Zelenko: That was as to Arthur Starke, too. If your Honor please, there is an alias of Arthur Starke in the indictment. He is identified as Arthur Starke.

The Commissioner: You had MacDonnell here. He appeared before the grand jury?

Mr. Zelenko: Right.

The Commissioner: You should leave nothing to guesswork about this thing. I do not know whether the record is entirely clear that the man he testified about before the grand jury is the same person who is here to-day.

[fol. 76] AUGUSTUS O. MACDONNELL recalled.

By Mr. Zelenko.

Q. Mr. MacDonnell, when you testified before the grand jury in Florida, did you see a picture of this man who to-day you identified as Arthur Starke?

A. No, I am not positive that I did.

Q. The man about whom you testified before the grand jury in Florida in this case is the man whom to-day you identified as Arthur Starke?

A. Yes,

Mr. Zelenko: That question was asked and answered before.

The Commissioner: I did not know you asked that. It may be so. I have no recollection that you did.

Mr. Zelenko: I did ask him before. That is all, Mr. MacDonnell.

(Adjourned to May 29, 1933, at 11 A. M.)

New York, June 1, 1933, 2:30 P. M.

Met pursuant to agreement.

Mr. Siegel: It is stipulated between counsel for the Government and Arthur Kassin, or Archie Kassen, that the proceedings may go on in the absence of Mr. Kassin.

OFFER in EVIDENCE

Mr. Zelenko: The Government offers in evidence a certified copy of an indictment returned in the United States Court for the Southern District of Florida against Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias [fol. 77] Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, and others, together with a capias for this defendant and the marshal's non est return.

Mr. Siegel: Your Honor, we object to the introduction of this indictment on the ground that it fails to connect itself with the defendant Archie Kassin.

The Commissioner: I will take the indictment.

Mr. Siegel: Exception.

(Marked Government's Exhibit 5.)

Mr. Zelenko: The Government rests.

Mr. Siegel: We have Mr. MacDonnell here and want to continue our cross-examination.

Mr. Zelenko: May we first have a ruling from the Commissioner as to the identification of this defendant?

The Commissioner: Are you questioning him on identity?

Mr. Siegel: Yes, we are questioning the identity, too.

The Commissioner: Let Mr. MacDonnell come up.

Mr. Zelenko: Do I understand Mr. MacDonnell is now a witness for the defendant?

Mr. Siegel: No, we had him under cross-examination.

The Commissioner: He is on for cross-examination.

Mr. Zelenko: But I understand that the defendant has given him a subpœna.

Mr. Siegel: We gave him a subpœna.

The Commissioner: Do you want to make him your own witness?

[fol. 78] Mr. Siegel: I would not like to make him my own witness. Here is the situation: He is a Government witness,

and the last time it was adjourned and now they have introduced this indictment, and the situation with this new indictment is different than it was without it.

Mr. Zelenko: This is the same indictment, but the capias is as to Kassin. The last one did not have a return as to Kassin. As I understand, further, at the previous hearings your Honor directed Mr. Siegel to fully cross-examine the Government's witnesses, and apparently he did; and now he has subpœnaed Mr. MacDonnell as the defendant's witness.

Mr. Siegel: The last time he did not have his correct papers, and, if he rested, I was willing to rest, obviously, because I felt your Honor would be compelled to dismiss the removal proceedings. Now you have opened up the case——

Mr. Zelenko: Just a moment, Mr. Siegel. The case has not been opened. The hearing was entirely open.

Mr. Siegel: But you say you rest.

The Commissioner: What is the argument? Do you want to cross-examine him?

Mr. Siegel: Yes.

The Commissioner: Did you cross-examine him before?

Mr. Siegel: Not fully. I will show you one page is all that we examined him. At that time I felt that we could rest, in view of the fact that his papers were insufficient to constitute probable cause. This time we feel we should have an opportunity to go a little further into it with the man.

The Commissioner: I will let you cross-examine him. He is called for cross-examination.

[fol. 79] AUGUSTUS O. MACDONNELL, recalled for further cross-examination, testified as follows:

Cross-examination.

By Mr. Siegel:

Q. Have you those cards with you that you produced the last time?

A. No. They were left here in court.

Mr. Siegel: May I have them?

(Mr. Zelenko hands Mr. Siegel cards.)

Q. I show you the Government's Exhibit 2——

Mr. Zelenko: Before you proceed, Mr. Siegel, the record shows here a complete cross-examination by you.

Mr. Siegel: If you will let his Honor look at it.

Mr. Zelenko: And the recross-examination. I think this witness should be the defendant's witness from now on, your Honor. There is a cross-examination and recross-examination.

The Commissioner: But you have put in a new indictment today.

Mr. Zelenko: The same indictment except for the capias.

The Commissioner: But you put it in evidence to-day. I will let him examine on recross.

Q. I show you Government's Exhibit 2, which you say that you saw signed (handing witness); is that right?

A. Yes.

Q. You testified before some grand jury down in Florida, didn't you?

A. Yes.

Q. Will you show me where that paper has been marked in evidence down there?

Mr. Zelenko: The Government objects to that question as incompetent, irrelevant and immaterial. This witness had nothing to do with the introduction of evidence before the grand jury in Florida.

[fol. 80] The Commissioner: I guess I will take judicial notice that they do not mark exhibits there.

Mr. Siegel: That they do not mark them?

The Commissioner: Yes.

Mr. Siegel: Exception.

Q. Had you been working at this bank for quite some time?

A. Yes, between four and five years.

Q. I show you now Government's Exhibit 3 (handing witness card) and ask you whether the writing on the left is in your handwriting?

A. It is.

Q. The "10 A. M." in your handwriting?

A. It is.

Q. And this other handwriting in the middle, is that yours?

A. That is mine.

Q. Are you seated when you write on that card?

A. Seated?

Q. Yes.

A. No.

Q. You stand?

A. Yes.

Q. You stand when you write on that card?

A. Yes.

Q. Are you in charge of the vaults down there in that bank?

A. Yes, sir.

Q. And when a person comes in you write down the date; is that right?

A. Yes, at first.

Q. You write down the date, don't you?

A. Yes.

Q. And you write down the hour?

A. Yes.

Q. And then the man signs it; is that right?

A. No; as a rule the man signs it first.

Q. The man signs it first, then you put down the date and the hour?

A. The date and the hour, and then I admit him.

Q. So all the dates that you had were from May 2nd, 1932, down to May 9th; is that right?

A. Yes, that is right.

[fol. 81] Q. And they only cover three days; is that right —May 2nd, May 5th and May 9th?

A. Twice on May 2nd, 1932, once on May 5th, 1932, and once on May 9th, 1932.

Q. That is three days that you saw that man; is that right?

A. That is right.

Q. You did not see him at any other time down there, did you, in the vault?

A. I saw him first on April 30th, the date he signed this.

Q. Yes, but outside of those four times you never saw him?

A. No.

Q. You wear glasses, don't you?

A. Yes.

Q. How long have you been wearing glasses?

A. Oh, five or six years.

Q. You have been wearing them during business hours, during the day?

A. Yes.

Q. What is the name of the bank where you——

A. St. Augustine National Bank, St. Augustine, Florida.

Q. How far is that away from Jacksonville?

A. About forty miles.

Q. There were no moneys taken out of your bank; your——

A. I don't know what you have reference to.

Mr. Zelenko: Just a minute, please. The Government objects to the questions as entirely incompetent, irrelevant and immaterial, whether any money was taken out of anybody's bank.

The Commissioner: I will sustain the objection.

Q. Outside of these transactions, you never had anything to do with a man you knew as Arthur Starke, did you?

A. No, that is all.

Q. When you testified before the grand jury, you said that it was at a time when Carr was being tried?

A. Yes.

[fol. 82] Q. Well, you were a witness in the Carr trial, weren't you?

A. I was subpoenaed there, but the day——

Mr. Zelenko: I cannot hear you, Mr. MacDonnell.

The Witness: I was subpœnaed as a witness, but I did not testify.

Q. If I told you that there is no record of any subpœna issuing for you, by the grand jury of Jacksonville, Florida, would you say that was a correct statement?

Mr. Zelenko: The Government objects to the statement, if your Honor please.

The Commissioner: No, he is trying to shake his veracity. I will let him answer that question if he can. He is testing his credibility as a witness.

Q. Is your name Augustus O. MacDonnell?

A. It is.

Q. If I told you that there was no record of a subpoena issuing to you, to appear as a witness before the Federal grand jury in Florida, would that refresh your recollection?

Mr. Zelenko: It would not refresh his recollection as to testifying, if your Honor please. Whether a subpœna was issued or not makes no difference.

The Commissioner: You did appear in court; that is a fact, isn't it?

The Witness: I did, yes.

Q. You appeared before a Federal grand jury down in Florida?

A. I did.

Q. The exact date that you appeared you do not know?

A. No, I do not recall the exact date.

Q. Now I am saying, would it refresh your recollection—did you get a subpœna to appear before any Federal grand jury?

A. No, not before the Federal grand jury.

[fol. 83] Q. Did you testify in the month of February, 1933, before the Federal grand jury?

A. I do not recall the date. If that was the date that Carr was—pleaded guilty in court.

Q. Outside of that, you have no other way of knowing the day you appeared before the Federal grand jury?

A. No, I know it was somewhere around about that time. I don't remember the date. I know it was that date, though, because I was subpœnaed there as a witness, and the fact that he pleaded guilty—why, I was not called on to testify.

The Commissioner: That was in the District Court?

The Witness: United States.

The Commissioner: District Court.

The Witness: Yes.

Q. You do not know exactly what grand jury you appeared before, do you—what day and what month?

A. No, I do not. They were in session, though.

Q. There was a Federal grand jury in session, and you appeared before a Federal grand jury in Jacksonville, Florida; is that right?

A. Yes.

Q. Exactly what Federal grand jury you appeared before you do not know, do you?

A. No, other than a Federal grand jury.

Q. Yes, you know you appeared before a Federal grand jury down in Jacksonville, Florida?

A. Yes.

Q. You do not know exactly what Federal grand jury it was, do you?

A. No.

Mr. Siegel: That is all.

Mr. Zelenko: No questions.

MOTION TO DISMISS

Mr. Siegel: I move to dismiss the case that has been attempted to be made out, upon the ground that the Government has failed to show probable cause and failed to [fol. 84] prove the identity of the defendant, and failed to make out a case warranting by statute the removal of the defendant Kassin.

The Commissioner: I will deny that motion.

Mr. Siegel: Exception.

Defendant's Case

OFFERS IN EVIDENCE

Mr. Siegel: We offer in evidence certified copy of the docket entries in the United States District Court for the Southern District of Florida.

Mr. Zelenko: The Government objects unless the defendant can show where this is material, relevant or competent.

Mr. Siegel: Will your Honor look at it, please (handing to Commissioner)? If you want to know the purport of it, we will be glad to state it.

Mr. Zelenko: Just a minute, please. If it has to do with the writing, which is not in evidence yet, I do not think it should go on the record, what the purport is.

Mr. Siegel: We offer it in evidence. The docket entry in relation to Archie Kassin. On the inside there is a certification by the Clerk of the Court that these are the docket entries. These are the Court docket entries, certified to by the Clerk of the Court.

The Commissioner: It might have been tried at a different time. This is an indictment of Julius L. Chadwick.

Mr. Siegel: He is a defendant.

The Commissioner: But it could be tried at a different time.

[fol. 85] Mr. Siegel: I am not talking about the trial. This shows——

Mr. Zelenko: Just a minute. If it is not in evidence, I do not want that in the record.

The Commissioner: Then leave it off the record.

Mr. Siegel: Is there some reason why it should not be in the record?

The Commissioner: All right, we will determine later on whether it shall go in the record. So if you think it should not, later on you may make a motion to strike it out.

Mr. Siegel: I want to show, your Honor, that on this paper, according to the docket entries, matching up with the indictment he offered in evidence, there came into the hands of the Marshal on February 3rd the capias, and on the same day he made a return, on that very same day, that the man could not be found in that county. That is what I offer it in evidence for.

The Commissioner: For the purpose of showing that the Marshal did not use due and diligent search?

Mr. Siegel: Yes, that is one of the grounds of it. And also it bears on the question of the man being a fugitive. We intend to offer other evidence here; this is only part of our case.

The Commissioner: This was returned at Jacksonville.

Mr. Siegel: Yes.

Mr. Zelenko: I fail to see where it is material, relevant or competent.

Mr. Siegel: I am going to point out the law here, your Honor, before we get through. The question of probable cause is a grave question before your Honor. In order to

[fol. 86] constitute probable cause they are using this indictment. They are using this capias; they are using this non est return.

Mr. Zelenko: Not for probable cause, Mr. Siegel.

Mr. Siegel: In order to show probable cause. That is what I think you are using it for.

Mr. Zelenko: I am using the indictment, not the capias or the non est return.

Mr. Siegel: The question as to being a fugitive is a question here.

Mr. Zelenko: No, it is not.

Mr. Siegel: If he is not a fugitive, he cannot be removed. That is what the law is all about. We want to show he got the papers that day and was told to look for the man, and the same day he returned them, that the man could not be found. That is what I want to show.

The Commissioner: The record will show that, the fact that it is the same day.

Mr. Siegel: Then can I offer that?

The Commissioner: It won't add anything to it. It is in the record now. It is in the record that it was the same day of the Marshal's return, and that he could not find him.

Mr. Siegel: May I read just one entry?

Mr. Zelenko: I do not see where counsel has a right to read something from a document that is not in evidence. It shows the non est return was the same day.

Mr. Siegel: May we mark this for identification?

The Commissioner: Yes.

(Marked Defendant's Exhibit A for Identification.)

Mr. Zelenko: I move to strike out the reason why counsel wanted to offer that in evidence.

Mr. Siegel: I have offered it in evidence.

[fol. 87] Mr. Zelenko: As we stand now, the purport of that paper is on the record, and your Honor told me that I could move to strike it out.

The Commissioner: No, it is not in the record.

Mr. Zelenko: But Mr. Siegel's explanation is.

Mr. Siegel: What is wrong with my explanation?

The Commissioner: It is not in evidence at all.

Mr. Siegel: Now we offer it in evidence. That will give you a chance to object to it.

Mr. Zelenko: I object to it on the ground it is incompetent, irrelevant and immaterial.

The Commissioner: Objection sustained.

Mr. Siegel: Exception. Now, your Honor, in accordance with our conversation with your Honor, we ask you to set the case over for one week.

The Commissioner: You are fully through with the out-of-town witnesses?

Mr. Siegel: Oh, yes. I am not touching them. With these out-of-town witnesses. We intend to call some out-of-town witnesses. I need at least a week for certain witnesses I want to call here.

(Adjourned to Monday, June 12, 1933, at 11 A. M.)

[fol. 88] Before Garrett W. Cotter, Esq., United States Commissioner

New York, November 15, 1933.

APPEARANCES:

George Z. Medalie, Esq., United States Attorney, for the Government; David Paley, Esq., Assistant United States Attorney.

David P. Siegel, Esq., attorney for the defendant.

Mr. Siegel: We offer in evidence the depositions of David N. Chadwick, Julius L. Chadwick and Leo Carr, taken before Hon. Edward S. Griffith, United States Commissioner, at Atlanta, Georgia, October 26, 1933.

(Marked Defendant's Exhibit A.)

Mr. Siegel: Your Honor, may we also put in the orders under which the depositions were taken?

Mr. Paley: I have no objection to the depositions.

Mr. Siegel: I think it is my duty to put in the order of the Federal Judge. This is an order dated October 2, 1933, signed by Judge Woolsey, directing the taking of depositions of Julius Chadwick, David N. Chadwick and Leo Carr.

(Marked Defendant's Exhibit B.)

Mr. Siegel: Now we offer in evidence the order to show cause and the accompanying affidavit, being signed by Judge [fol. 89] William Bondy, dated June 6, 1933, asking for the

issuance of a commission to one Leo Carr and one John Dixon.

(Marked Defendant's Exhibit C.)

Mr. Siegel: We ask that the order of Judge William Bondy, signed on the 12th day of June, 1933, be received in evidence, with the accompanying papers.

(Marked Defendant's Exhibit D.)

Mr. Siegel: We offer in evidence the depositions of John Dixon and Leo Carr taken before Edward S. Griffith, United States Commissioner, Atlanta, Georgia, on June 20, 1933, under and by virtue of a commission issued out of the District Court for the Southern District of New York, and the accompanying papers.

(Marked Defendant's Exhibit E.)

Mr. Siegel: In the order issuing the depositions Judge Coxe stated that we had the right to introduce these depositions in evidence on the question of probable cause, citing various cases.

(Mr. Siegel moved to dismiss the proceedings, and thereupon argument was had upon the motion.)

The Commissioner: The Government of the United States is assumed not to be acting over-zealously. They had a grand jury that indicted this man as part of the conspiracy. If it was larceny or a substantive offense of any kind, and you had made the same showing as you make in this, there may be something in your favor; but this is a conspiracy charge and I cannot see where you have obliterated the probable cause entirely.

[fol. 90] Mr. Siegel: Will you do this for me? Will you permit me to submit a memorandum?

The Commissioner: Yes, I certainly shall.

Mr. Siegel: May I have forty-eight hours to submit a memorandum of law?

The Commissioner: Yes.

Mr. Paley: I want twenty-four hours to answer. Your Honor states that you will give him an opportunity to present other witnesses?

The Commissioner: I cannot stop him from presenting them.

Mr. Paley: Are we resting now?

Mr. Siegel: No.
Mr. Paley: The Government has rested.

Before Garrett W. Cotter, Esq., United States Commissioner

New York, December 14, 1933.
12:00 Noon.

Present: Mr. Palmieri, Mr. Paley, Mr. Siegel.

STIPULATION AS TO CERTAIN TESTIMONY

Mr. Siegel: It is stipulated that if Dr. Morris Kalmus, Dr. Meylackson, Mr. Albert Fisher and Mrs. S. Goldsmith were called, they would testify that they know the defendant Archie Kassin and have known of his reputation for honesty and veracity, and that his reputation for honesty and veracity is excellent.

Mr. Palmieri: That is consented to by the Government. [fol. 91] Mr. Siegel: It is understood that this stipulation is to have the same effect as though these persons were actually called in the court room and examined by both sides. That is consented to by the District Attorney?

Mr. Palmieri: Yes.

ARCHIE KASSIN, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Siegel:

Q. What is your name?
A. Arthur Kassin.
Q. Where do you reside?
A. 210 West 101st Street.
Q. Borough of Manhattan, City of New York?
A. Yes, sir.
Q. Are you married?
A. Yes, sir.
Q. Is your wife in court here?
A. Yes, sir.

Q. Have you any children?
A. One.
Q. What is the name of that child?
A. Ione.
Q. Boy or girl?
A. Girl.
Q. Were you ever in the State of Florida?
A. Yes, sir.
Q. Will you tell his Honor when?
A. Three times during the racing season, in January for the first time.
Q. Did you meet anybody there?
A. Yes; I met a gentleman by the name of Arthur Fineberg that I was introduced to by my official friends.
Q. What was the purpose of your going down to Florida?
A. I went down there for the racing season, for a vacation.
[fol. 92] Q. Did you have any talk with Arthur Fineberg while you were there?
A. Yes, we got quite friendly, we used to talk together, and this Arthur Fineberg told me he was a resident of the City of Jacksonville and that he was very well connected politically, and if I ever come to that State I should call on him.
Q. Did you talk to him about any business venture?
A. Yes. After he told me that I says, "I have some proposition that I would like to propose to you." So he said, "What is it?"
Q. Did that concern a mint vending machine?
A. Yes, sir.
Q. Did you hear from him again?
A. I heard from him in the early part of February.
Q. What happened then?
A. He told me he had started in a certain business at St. Augustine.
Q. Did that concern itself with the mint vending machines?
A. Yes, sir.
Q. That is to say automatic candy salesmen?
A. Yes, sir.
Q. Machines that were installed in different cities in which candies would come out of the machines?
A. Yes.

Q. Did you subsequently go down to Jacksonville, Florida?

A. Yes, sir.

Q. Did you meet Mr. Fineberg there?

A. I did.

Q. What occurred there?

A. He asked me on what basis I would want to do business; that he was ready to do business. I told him I would do business if he would put up a like amount that I would put up and we would b-y these machines and we would divide up. He says to me, he says, "I have my money all tied up right now, but if you will give me some time, I like the proposition very much, and if you will give me some time [fol. 93] I will try to arrange to get this money." He said, "But don't you think I ought to be compensated for the work that I did?" I says, "Well, how about the work that I have done in connection with getting these machines and all that?" He says to me, "All right, well, let us not go into that matter now. I like the proposition. Give me time to think it over and I will let you know further." So I left.

Q. Did you hear from him again?

A. I heard from him later on, in March.

Q. In the early part of March, in April you mean, was it you heard from him? When did you hear from him, in the latter part of March or the beginning of April?

A. Around that time.

Q. Then what occurred?

A. Then—I do not know just the exact time, but it was around that time—he wrote me I should come down again, he was ready to do business and to put up a like amount. So I come down there with $2500, and I went and registered at the Casa Marino Hotel.

Q. What name did you register under?

A. Under the name of Arthur Starke.

Q. Then what happened?

A. When I registered——

Q. (Interrupting.) What did you do with the money?

A. I took the money and stayed there a few days and I went to St. Augustine. 'Instead of carrying the money on my person I rented a vault down there and put the money in because it was very unwise to carry too much money on my person.

Q. Did he put up the money?

A. No, he did not put up the money. He kept stalling me around and telling me I should go ahead and get the machines. I told him I was not doing business that way. So I says to him, "Now, listen, give me a final answer whether [fol. 94] you want to put up the money or don't you want to put up the money?" So he said, "I am sorry I sent for you to come down here, but it is very hard for me to get that money." So he said, "If I ever have occasion"——

Q. So the venture fell through?

A. So the venture fell through and I took my money out of the bank and left.

Q. That was the end of the matter?

A. That was the end of the matter.

Q. Do you know a man by the name of Leo Grombacker, alias Leo Carr, alias the Professor, alias Lawrence Kolmer, alias Leonard Gross, alias S. W. Rice, alias T. L. Pierce, alias Larry Pierce, alias Harris, alias Leo Pierce, alias Jerome Goldberg, alias Edward Welsh, alias Eddie Leland, alias Eddie Levine, alias Harold Phillips, alias Joseph Kramer, alias Richard Gilman, alias Joe Duffin, alias Charles B. Davis, alias Jeriham Selman, alias Jack Seeman, alias Jack Seiman, alias John Burtone, alias T. H. Rice, or a man by the name of Edward Livingston, alias E. Livingston, alias Ike Kloston, alias Isidore Kotzen, alias I. Kotzen? Did you have anything to do with these men?

A. I do not know them and I never heard of them.

Q. Do you know a man by the name of Julius L. Chadwick?

A. No, sir.

Q. Or David Chadwick?

A. No, sir.

Q. Did you ever enter into any conspiracy with those men of any kind or nature in your life?

A. I do not know these people.

Q. Did you ever enter into any conspiracy with these men in your life?

A. No, sir.

Q. Did you ever enter into any illegal scheme whatsoever with these men?

A. No, sir.

[fol. 95] Q. Did you ever have anything to do in your life with the forging of any checks directly or indirectly?

A. No.

Q. Did you ever give any checks to be forged?

A. No, sir.

Q. Were you ever in any conspiracy with these men to forge any checks?

A. No, sir.

Q. Or to take any moneys out of a Florida bank?

A. No, sir.

Q. Did you ever enter into any agreement with these men, or any conspiracy with one or more of these men to commit any of the crimes charged in this indictment?

A. No, sir.

Q. Or any of the acts charged in the indictment?

A. No, sir.

Q. Did you ever have anything to do with the checks that were drawn upon the account of the Almours Securities, Incorporated?

A. No, sir.

Q. Were you ever in the company while you were in Florida of any of these people?

A. No, sir.

Q. Did you ever have anything to do with the Florida National Bank of Jacksonville?

A. No, sir.

Q. What was the name of the bank where you had this little vault?

A. St. Augustine National Bank, I believe.

Q. That is in St. Augustine?

A. Yes.

Q. How far is St. Augustine away from Jacksonville?

A. About forty miles away.

Q. Did you have anything to do with any of these men or anybody else in the world in connection with any of the crimes charged in this indictment?

A. No.

Q. Or in connection with any banking transactions of any kind, nature or description?

A. No, sir.

[fol. 96] Q. You claim you are absolutely innocent of any charges in this indictment?

A. Absolutely.

Cross-examination.

By Mr. Palmieri:

Q. Mr. Kassin, why did you use a fictitious name when you went down to Florida?

A. When I went down to Florida I didn't have any idea of using a fictitious name, but being on account I was talking to some people about it, and I told that to Mr. Finberg in reference to the proposition, so I did not want it to get around about the proposition, so he said, "I think you had better use"—it was his suggestion—"use a different name."

Q. You mean because you did not want any people to know that you were down there on that proposition?

A. No, that they should not—the people I was speaking to knew that Mr. Finberg was going to be connected with me, and he suggested that I use a different name, so they would not know that I was down there if they wanted to reach me, because of saying to these people that I went down there on my own hook.

Q. It might interfere with this business?

A. Yes, sir.

Q. Were you ever convicted of a crime?

A. No, sir.

By the Commissioner:

Q. Where did you meet Finberg?

A. During the racing season at the racetrack in Florida.

Q. Who introduced you?

A. A gentleman by the name of Arthur Harris.

Q. After you met him what conversation did you have?

A. We got quite friendly, and we would talk over tips from the races. He was telling me he was a resident of [fol. 97] Jacksonville, Florida, and that he was very well connected there, and that if I had occasion to call on him I should call on him. I told him that I have a very good proposition that he might be interested in. I explained to him these vending machines, candies and chocolates, and he said he liked it very much, and he thinks it is very good and that it would go down there. He said I should write him and I did write him. He wrote me I should come down there and that is how I got down there.

Q. Did you control the machines?

A. I had money to buy these machines.

Q. Enough money to buy them?

A. Enough money to buy them; you can pick them up in the vending stores and all that.

By Mr. Palmieri:

Q. We do not want to go through all of this.

A. And distribute them in the stores and busses.

Q. Where is Finberg now?

A. He is dead. He died just a year ago from heart failure.

By Mr. Siegel:

Q. Is that the reason why you cannot call him here as a witness?

A. That is the reason I cannot.

Q. Mr. Kassin, could you call his wife as a witness?

A. I think she would come up. I think I can get an affidavit from her bceause she knowed I was down there for that purpose. Because we were out to dinner together.

[fol. 98] BETTY KASSIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Siegel:

Q. What is your name?

A. Betty Kassin.

Q. What is your relationship to Arthur Kassin?

A. I am his wife.

Q. How long have you been married to him?

A. Twelve years.

Q. You live together?

A. Yes.

Q. Have you a child?

A. Yes, sir.

Q. Boy or girl?

A. Girl.

Q. What is the name of the child?

A. Ione.

Q. Do you know of your own knowledge that during the month of April, 1932, that your husband was in Florida in connection with the distribution of mint vending machines?

A. Yes, I do.

Q. Do you know you are testifying under oath here?
A. Yes, I do.
Q. And did you receive a letter from your husband while he was down there?
A. Yes.

Cross-examination.

By Mr. Palmieri:

Q. You are telling what your husband told you?
A. I knew he was going down on that matter.
Q. That was what he told you?
A. No, he received a letter from this man.
Q. Did you see the letter?
A. Yes, I did.

Mr. Siegel: We rest unless there is any additional testimony that you desire we should produce.

The Commissioner: You have exhausted yourself on that, haven't you?

[fol. 99] Mr. Siegel: It is not that I have exhausted; I feel we have given you everything we humanly can. In the face of all these cases that I have read and gone over and shown all the legal reasons for, there is not a shred or scintilla of evidence. This man himself testified under oath before you. They have presented their case before you, the District Attorney has——

Mr. Palmieri: Have you officially rested?

Mr. Siegel: Yes, we rest.

Mr. Palmieri: The Government will rest on the witnesses we have presented. We cannot present any other witnesses; we have none.

Mr. Siegel: The Government has not any other witness. I feel that we have explained these vaults. Your Honor had a right to ask that it be explained. Of course that was an inferential matter. This vault was taken in a bank twenty miles away. Clearly that situation involves no connection or cause or relationship showing between the taking of that vault and the commission of the crime. This man swears that he does not know the other men, never associated with them, and had nothing to do with the commission of the crime. His wife has testified. Every person that was connected with the commission of the crime who had pleaded

guilty or who was found guilty has testified under oath that they had nothing to do with this man; that he is innocent of this crime. So that all of the evidence is in favor of the defendant, none of the evidence is against him. We have overwhelmingly rebutted anything that has been offered here, and I believe it is your Honor's sworn duty in this case not to remove this man. Now it is obvious that a powerful private party may be interested in his removal.

[fol. 100] The Commissioner: I do not know of any such.

Mr. Siegel: I say the bank is a powerful private party, but if this evidence is taken on the law in accordance with this record, even if you followed the strict letter of the law it would be your sworn duty, so far as I have known you, and I have always found that you have gone in accordance with your conscience and oath of office, I want to say to you that from my study of this record here there is not a scintilla or a shred of evidence here against us. The prima facie presumption of an indictment is of coure rebuttable. All of these people are standing before you now, with a deposition in front of you, saying that this man had nothing to do with it. They have not any witnesses as I have nothing to rebut, and the Government rests, and I say that I feel that your Honor should do justice in this case because of the overwhelming proof in this case of the man's innocence.

The Commissioner: Is this man out on bail?

Mr. Siegel: Yes. May I say this, your Honor, that if this man committed a crime the State of Florida can indict him. There is a difference between the State law and the Federal law. It must be very significant to you that they did not indict him.

The Commissioner: I will reserve decision.

[fol. 101] Before Garrett W. Cotter, Esq., U. S. Commissioner

New York, May 12th, 1934.

APPEARANCES:

Martin Conboy, Esq., United States Attorney, for the Government, J. Randell Creel, Esq., Assistant United States Attorney.

David P. Siegel, Esq., attorney for the defendant.

Mr. Siegel: I would like to have an opportunity to submit the sworn testimony of another man who was named in the indictment who I think is at this time under bail in Cleveland. I would like to get his testimony before the Court. His apprehension as I understand it only took place recently and therefore there has been no delay on our part. He has been a fugitive all this time.

Mr. Creel: I do not think a hearing before a Commissioner should be decided on affidavits, but the man should be brought here in behalf of this defendant.

The Commissioner: If he is out on bail he ought to be here.

Mr. Siegel: I could try to bring him here, but in view of the Government's statement that he should be brought here, under those circumstances we will try to bring him here.

The Commissioner: If he can be brought here he should be.

[fol. 102] Mr. Siegel: With reference to depositions, that has been taken up with the Federal Court twice and the Federal Court has ruled they may be taken.

Mr. Creel: If the defendant can obtain an order of the Court permitting him to take depositions——

Mr. Siegel: He can. I cannot say positively because I have not read it, but the understanding was we were to be given the right where we could not get people to be here to take their depositions.

Mr. Creel: Your understanding with whom?

Mr. Siegel: In the application we made originally we made it for all people available.

Mr. Creel: I understood the application was because the individuals were incarcerated in Federal or State prison.

Mr. Siegel: I think this man is incarcerated now in Cleveland, Ohio.

Mr. Creel: As soon as definite information is had then this question can be raised. Until then I suggest that we let it pass.

The Court: He is asking for permission now to submit the deposition. If the man is available and not incarcerated he ought to be here.

Mr. Creel: Do you rule, Commissioner, in the event he is incarcerated you would grant permission or they would have to apply to the Court?

The Court: They would have to apply to the Court the way it was done before. There is no use bothering the Court if he is a free lance and can be here.

Mr. Creel: At this time I should like to reopen and continue the hearing for the removal.

The Commissioner: Granted.

Mr. Creel: Has the indictment been sufficiently proved and identity established?

The Commissioner: Yes.

[fol. 103] Mr. Creel: Then the only thing that remains is probable cause and the connection of this defendant with the crime alleged.

The Commissioner: That is correct.

Mr. Creel: I call as my first witness A. O. MacDonnell.

Mr. Siegel: He was heard before in this proceeding. I object to his being recalled.

Mr. Creel: Mr. MacDonnell is prepared to give additional testimony.

Mr. Siegel: I object to this being recalled. He was examined and cross-examined and was before the Court and I think additional testimony under those circumstances would only be scrutinized with great suspicion by anybody and I object and I do not think the objection should have to be raised.

Mr. Creel: Since his testimony was heard certain affidavits have been filed which necessitate the joining of defendant with the crime other than the prima facie case.

The Commissioner: I will take the testimony. You may cross-examine him as long as he is here.

Augustus O. MacDonnell, recalled, testified further as follows:

Direct examination.

By Mr. Creel:

Q. What is your employment?

A. Vault custodian of the St. Augustine National Bank, St. Augustine, Florida.

Q. How long have you been so employed?

A. About five years.

[fol. 104] Q. You were a vault custodian of the St. Augustine National Bank in the year 1932?

A. Yes.

Q. Did you testify before the Grand Jury against——

Mr. Siegel: Objected to; all of this having previously been gone over.

The Commissioner: I will allow it.

Mr. Siegel: Exception.

Q. Did you testify against the defendant known as Jerome Goldberg, alias Harold Phillips?

A. I did.

Q. Did you testify against a defendant Simon, alias Rice?

A. I did.

Q. Did you testify against a defendant Kassin, alias Starke?

A. I did.

Q. You have previously testified here as to defendant Kassin, alias Starke, having taken a safe deposit vault in your bank?

A. I did.

Q. Now, Mr. MacDonnell, have you ever seen Kassin in the company of any other defendants named in this indictment?

Mr. Siegel: Objected to, this witness having been called heretofore, having been given an opportunity, and now being called at this belated hour it is obviously unfair to the defendant.

The Commissioner: I will hear him; you may cross-examine.

Q. You have seen the defendant Kassin in the company of other defendants named in this indictment?

A. Yes.

Q. What is the name of that one defendant?

A. Goldberg, alias Phillips.

Mr. Siegel: This is the same man I spoke to you about that was arrested in Cleveland.

[fol. 105] Q. Now, will you tell me in detail about what you saw when Kassin and Goldberg were together?

Mr. Siegel: This is objected to on the ground that the time is not fixed and on the ground that this witness was given

an opportunity to testify here and on the ground that I was given no notice that this witness was to be recalled and on the ground that it would be totally unfair and an improper thing to allow a witness to be recalled virtually a year after he had originally testified in this matter.

The Commissioner: Objection denied.

Mr. Siegel: Exception.

Q. Will you please state the approximate time when you saw Kassin and Goldberg together?

A. I cannot state the date, but they both had safe deposit boxes in the bank and it was during that time they were both customers.

Q. During what time did these defendants have boxes in your bank?

A. During the latter part of April and May.

Q. What year?

A. 1932.

Q. Now, will you tell me what happened, what was happening when you saw Kassin and Goldberg together?

Mr. Siegel: I object to that.

The Commissioner: He may tell what he saw.

Mr. Siegel: Exception.

A. I saw them come in the bank together. I don't know the date, but they walked down the lobby of the bank towards the entrance to the safe deposit vault and Goldberg stopped halfway down and sat down on a bench in the lobby. Starke came on in and entered the safe deposit box. I admitted him. And then he went out.

[fol. 106] Q. Who is he?

A. Mr. Starke. That is the name he registered there by —Kassin. The box was in the name of Arthur Starke.

Mr. Siegel: I move to strike out the reference to Kassin.

The Commissioner: He said he hired the box to Starke.

The Witness: Yes.

The Commissioner: That may remain.

Mr. Creel: This witness has previously identified Mr. Starke.

The Commissioner: That is in the record.

Q. What did Mr. Starke, or as you now know him, Mr. Kassin, do?

A. He deposited.

Q. You have testified before the Grand Jury against a Mr. Goldberg.

A. Yes.

Q. This Mr. Goldberg against whom you testified is the Mr. Goldberg against whom you testified in Mr. Kassin's custody?

The Commissioner: You mean company.

Mr. Siegel: I move to strike out the word company. He hasn't said he was in his company.

The Commissioner: Bring out everything. If they went out together or had conversation, that is what we want to know.

Q. When Mr. Kassin or Starke went out did Mr. Goldberg continue to sit on the bench?

Mr. Siegel: Objected to.

By the Commissioner:

Q. Did these two men come in together?

A. I thought they were together, they were side by side.

Q. One sat on the bench?

A. Yes.

Q. The other went to the safe deposit box?

A. Yes.

[fol. 107] Q. When he got through with the safe deposit box and went out what did Goldberg do?

A. I didn't notice.

Q. Do you know whether——

Mr. Siegel: I object to that.

The Commissioner: I am trying to bring out the facts. Perhaps you are right on that.

By Mr. Kreel.

Q. You say Kassin and Goldberg came into your bank together?

Mr. Siegel: I object to it as leading.

The Commissioner: The witness ought to tell what he saw, everything that he saw.

The Witness: I saw them come in the bank together, the front entrance of the bank. They were very few people at the bank at the time and my desk is just beside the door in line with the vault entrance. I took it for granted they were together. They walked down the lobby halfway. I thought they were coming in all the way and I prepared to open the door to let them in, but Mr. Goldberg, registered as Phillips, sat down on the bench and Mr. Kassin, or Starke, came on in. I admitted him to his box. He went into the private booth and he came out of the grille door as if he was looking for someone——

Mr. Siegel: I move to strike that out.

The Commissioner: He came out of the grille door and what did you see happen?

The Witness: He went back in the booth, finished what he had to do there, put his box back in the vault and departed. I didn't see them go out together.

[fol. 108] The Commissioner: Did you see Goldberg after he left the vault?

The Witness: No, I didn't see anything after that.

Q. Now, Mr. MacDonnell, will you answer the question that I asked: Is this Goldberg that you saw with Mr. Kassin the Goldberg against whom you testified in the Florida Grand Jury?

A. Yes.

Q. I show you this picture and ask you if that is the picture of the Goldberg that you saw with Mr. Kassin?

A. That is the man I identified in Cleveland yesterday as Harold Phillips.

Q. And this is the man you testified against in the Florida Grand Jury?

A. Yes.

Q. And this is the man you say came in to the bank with Mr. Kassin?

A. Yes.

Mr. Creel: I offer this picture in evidence.

The Commissioner: Let it be marked.

(Marked Government's Exhibit No. 1.)

Q. Now, I ask you, Mr. MacDonnell, did you ever see this Mr. Goldberg whose picture you have just identified in the company of a man by the name of Jerome Simon, alias Rice,

that you have previously identified before this Commissioner?

A. Simon and Goldberg under the names of Phillips and Rice rented a box jointly in the St. Augustine National Bank.

Q. I ask you if your records show that this Mr. Goldberg whose picture you have identified and a defendant by the name of Brombach, alias Gross, also had a box in your bank?

Mr. Siegel: Objected to.

Mr. Creel: The purpose of this question is to show the connection of Goldberg, who was seen in the company of Kassin, with this conspiracy.

[fol. 109] The Commissioner: We are not interested in anyone else except Kassin.

Cross-examination.

By Mr. Siegel:

Q. Mr. Witness, you were up here about a year ago?

A. Yes.

Q. And you testified, did you not?

A. I did.

Q. And before you testified you were examined by the Assistant United States Attorneys, is that right, you were examined by representatives of the Government, were you not?

A. Examined?

Q. You were spoken to by representatives of the Government?

A. I was at their office.

Q. And representatives of the Government before you testified here had spoken to you about the case?

A. Yes.

Q. And you had appeared before the Grand Jury down in Jacksonville, Florida?

A. Yes.

Q. Then they spoke to you about what you knew about the case?

A. Yes.

Q. Then you came up here and testified, is that correct?

A. Correct.

Q. The last time you were here you never mentioned any of the incidents concerning which you testified this morning, is that correct?

A. Yes.

Q. Now, since that time who has spoken to you about your testimony here?

Mr. Creel: I object to that.

The Commissioner: I will let him answer. That is cross-examination.

Q. Who has spoken to you about your testimony here?

A. I was speaking with the attorney here.

Q. Mr. Creel?

A. Yes.

Q. When did you speak to him, to-day?

A. This morning.

[fol. 110] Q. You didn't speak to him before this morning did you?

A. No.

Q. Whom did you speak to before you spoke with Mr. Creel?

A. I don't know exactly what you mean by "speaking to someone before you spoke to Mr. Creel." I spoke to several people about the case.

Q. Have any representatives of the bank that claim to have been defrauded been in touch with you?

A. No, sir.

Q. Nobody has been in touch with you at all, is that right?

A. That's right.

Q. With regard to the incident that you spoke of; as I understand it Goldberg came down into this bank, is that right?

A. Yes.

Q. And at the same time Kassin came down, is that right?

A. They were there at the same time.

Q. And then Goldberg signed his name and went into a vault, is that right?

A. Goldberg?

Q. Yes.

Mr. Creel: That isn't the testimony here.

The Commissioner: He has a right to cross-examine him.

Mr. Creel: But I do not think counsel has a right to twist the testimony.

Mr. Siegel: I have a right to cross-examine.

Mr. Creel: But not to distort the testimony of the witness.

Mr. Siegel: I have a right to establish the real facts.

Q. Did Mr. Goldberg walk in first into the vault?

A. First when?

Q. Who was the first one on the day, at or about the same time they went into the vault, who was the first one that went in?

A. Mr. Starke. Mr. Goldberg did not go into the vault at all.

[fol. 111] Q. Mr. Starke went in?

A. Yes.

Q. You don't know when Mr. Goldberg left the bank, do you?

Mr. Creel: I object. The time and place of these questions should be fixed.

The Commissioner: You are the one to fix them. You didn't do it except in a rather indefinite manner. Now, he has the right to cross-examine him. You are the one that produced this witness.

Mr. Creel: The question was which man entered the box.

The Commissioner: That is the date in question. The question states that.

Mr. Creel. Both men had boxes.

The Commissioner: Certainly, but this is the incident at which both were together.

Q. When Starke went into the vault you went along with him, didn't you?

A. Yes, I admitted him to the vault.

Q. And when he left you were still in the vault?

A. I was at the entrance.

Q. And as you said you did not notice what happened to Goldberg?

A. No, I did not.

By Mr. Creel:

Q. When you were here previously were you ever asked any questions about this incident that you have testified to this morning, that is your seeing Kassin and Goldberg together?

A. No.

Q. Is that the reason you did not testify to this particular incident?

A. Yes.

By Mr. Siegel:

Q. On the same floor where this vault is was the paying tellers?

A. Yes.

[fol. 112] Q. How many paying tellers were there?

A. We have a different number—four or five.

Q. And these paying tellers were all on the same floor as the vault?

A. Yes.

Q. As a matter of fact before you get in the vault there is a large gate there, is that correct?

A. Just a grille gate.

Q. Is there a gate there, a steel gate?

A. Yes.

Q. How high is this gate?

A. About 6 or 7 feet.

Q. And that gate is intended to bar people out who don't go into the vault?

Mr. Creel: Objected to.

The Commissioner: I will allow that.

Q. What is the purpose of this steel gate that is over 6 feet high?

A. Yes, that is to keep out the public.

Q. And you don't know where Goldberg went outside that gate, do you?

A. No.

Q. And he didn't come inside the vault that day, did he?

A. No.

Q. And did you go to the vault with Starke on that day?

A. Yes.

Q. So that your back was turned to Goldberg on the outside, is that right?

A. Yes.

Q. And you did not see where Goldberg went, did you?

A. No.

Q. And you did not see what Goldberg did, did you?

A. No.

Q. And you never saw Starke rejoin Goldberg that day, did you?

A. I did not.

By Mr. Creel:

Q. You referred to a grille—is that a grille through which you can see clearly and plainly?

A. Yes.

[fol. 113] Q. Describe that grille.

A. It is an ordinary grille door with upright bars about the size of your finger and about 4 or 5 inches distance between them. A person was clearly visible through it.

Q. And you did see through it?

A. Yes.

By Mr. Siegel:

Q. How far were you on the inside of these bars?

A. About the length of this table.

Q. Fix it for yourself.

The Commissioner: About 5 feet.

Mr. Siegel: I think it is more.

The Witness: About 6 feet.

Q. And these bars are made of steel, that comprise this gate?

A. Yes.

Q. How far apart are these bars?

A. 4 or 5 inches.

Q. What was the diameter of these bars?

A. Probably half an inch, something like that.

(After informal argument a week's adjournment given either to have defendant Goldberg here in person or to apply to the Court for permission to take depositions if Goldberg is incarcerated:)

[fol. 114] Before Garrett W. Cotter, Esq., United States Commissioner

New York, June 19, 1934, 11:15 A. M.

APPEARANCES

Martin Conboy, Esq., United States Attorney, for the Government; by J. Randall Creel, Esq., Assistant United States Attorney.

David P. Siegel, Esq., attorney for the defendant.

Mr. Siegel: Let it appear in the record that the defendant Archie Kassin is here in court.

In going over the minutes, we find that the deposition that was taken of Richard Gillman has not been incorporated into the typewritten record, that is, in the stenographic record, so we now ask that it be marked as an exhibit on the part of our direct case. It has been here for quite some time before the Commissioner, but it was never entered up in the record.

Mr. Creel: Your Honor, I am not familiar with that and I have not been furnished with a copy of it.

Mr. Siegel: It has been here before you in the case.

The Commissioner: What is his name?

Mr. Siegel: I just ask to have it entered in the record. I do not have to ask it.

The Commissioner: What is the name?

Mr. Siegel: Richard Gillman. It was taken pursuant to an order of October 6th.

Mr. Creel: If it was taken pursuant to an order and if it was subject to cross-examination, there is no objection. [fol. 115] Mr. Siegel: That is just what happened. We appeared on that hearing, and there appeared on that hearing also the representative of the Government.

The Commissioner: Have you got it here?

Mr. Creel: May I ask, is Gillman one of the defendants?

Mr. Siegel: I think Gillman is one of the defendants. I think the man was given a suspended sentence down there, pleaded guilty, I believe, down in Florida, and I think it was taken in jail.

Mr. Creel: His real name is Cramer, alias Richard Gillman?

Mr. Siegel: That is it, yes. Maybe you know him under the name of Cramer. Here it is, your Honor (handing copy of deposition).

Mr. Creel: There is no objection, your Honor, to the introduction of the deposition.

Mr. Siegel: In view of the fact that there is no objection to the introduction of the Richard Gillman deposition, may we ask that it be deemed marked Defendant's Exhibit X?

The Commissioner: Ask that it be read into the record at this time.

Mr. Siegel: We ask also that it be read into the record at this time.

(The deposition is as follows:)

[fol. 116] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Depositions of witness produced, sworn and examined on the 22nd day of June, in the year one thousand nine hundred and thirty-three, at the office of Mr. Chapman, Superintendent of the Florida State Penitentiary, Raiford, Florida, under and by virtue of a Commission issued out of the District Court of the United States for the Southern District of New York, in a certain cause therein pending and at issue, wherein the United States of America is plaintiff and Arthur Kassin is defendant, as follows:

There were present at said hearing Carl Noble, Esq., United States Commissioner, Mr. W. P. Hughes, United States Attorney, Southern District of Florida, and Samuel P. Spector, Esq., of counsel for the defendant.

The testimony was taken down in shorthand and reduced to writing by John R. Gurtler, shorthand reporter.

RICHARD GILLMAN, now an inmate of the Florida State Penitentiary at Raiford, Florida, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the defendant, doth depose and say as follows:

Direct examination.

By Mr. Spector:

The Commissioner: I will warn the defendant as to his rights. You are not compelled to testify unless you want [fol. 117] to testify. If you testify, you testify under oath the same as any other witness, subject to cross-examination, and if you are tried on the indictment now pending against you, the testimony can be repelled in that court. Do you want to make a statement?

The Witness: Yes, sir.

By Mr. Spector:

Q. Mr. Gillman, you are at present an inmate of the Florida State Penitentiary?

A. Yes, sir.

Q. As a result of a conviction for a series of forgeries?

A. Yes, sir.

Q. Were these forgeries committed against the account of the Almours Securities, Incorporated, and the Florida National Bank of Jacksonville, Florida?

A. Yes, sir.

Q. I show you this photograph, and ask you whether or not you know the individual (handing same to the witness)?

A. I can't recall. I never had any contact with that man.

Q. Do you know him?

A. I don't know whether I do or not; I know a lot of people; I may have seen him; I never had any dealings with him to my knowledge.

Q. You never had any dealings with him to your knowledge?

A. No, sir.

Mr. Spector: I offer the photograph of Arthur Kassin in evidence.

Mr. Hughes: No objection to the offer of the photograph.

Mr. Spector: All right; mark it.

The Commissioner: Defendant's Exhibit 1.

Q. Now, Mr. Gillman, did this gentleman have anything to do, to your knowledge——

A. None, whatever.

[fol. 118] Q. —with the crimes of forgeries as specified in the indictment entered on the December Term, 1932, of the District Court for the Southern District of Florida?

A. Not to my knowledge, he hasn't.

Q. Did he in any way help or assist or aid in any way with the forgeries specified in the various counts in this indictment?

A. I don't think he had, in fact, he has not.

Q. Was he in anywise interested in the forgeries committed?

A. I can't say.

Q. I mean——

A. I have no knowledge of that fact; so far as I know he didn't have anything to do with it.

Q. Did he ever discuss or talk or meet with any of the other persons mentioned in this indictment, regarding these forgeries?

A. Not to my knowledge.

Q. During the time that you were in Jacksonville, Florida, or at Jacksonville Beach, did you ever see this man there?

A. I can't recall seeing him.

Q. During the dates and times specified in this indictment, you had occasions to see all persons connected with this series of operations and crimes?

A. I did.

Q. And was this gentleman ever present, or did you ever see him, discuss with him, or heard discussed in his presence, any of the details of the particular series of crimes?

A. I did not, no, sir.

Q. If he had been involved in these series of crimes, would you have known about it?

Mr. Hughes: I object to that.

Mr. Spector: On what grounds?

Mr. Hughes: Because it is a conclusion of the witness.

[fol. 119] The Commissioner: I sustain the objection.

Q. You know everybody connected with these series of crimes?

A. I do.

Q. There is nobody that you did not know that was connected with this crime?

A. I know everybody that was connected.

Q. Was this gentleman in anywise connected with this series of crimes?

A. Not to my knowledge.

Mr. Spector: That is all.

Cross-examination.

By Mr. Hughes:

Q. Will you state your name again to the stenographer.

A. Sir?

Q. Give your name again to the stenographer.

A. Richard Gillman.

Q. Is that your correct name?

A. That is the name I assumed here.
Q. That is the name you assumed here?
A. Yes, sir.
Q. Will you give your correct name to the stenographer?
A. Joseph Kramer.
Q. How old are you?
A. I will be forty in August.
Q. Where were you born?
A. Brooklyn, New York.
Q. How long did you remain in Brooklyn, New York?

Mr. Spector: Wait a minute; I object to this line of questions, as not being within the scope of the commission.

Mr. Hughes: He has testified here as to his connection with everybody connected with this violation. We are entitled to show the places and people he has met.

[fol. 120] (Argument off record.)

The Commissioner: The question before me right now is when did he live in Chicago, and I am going to let him answer that question.

A. In '27, 28, 29, 30 and 31.
Q. You were making your home in Chicago during all those years?
A. Yes, sir. And at other towns around, going around to Detroit during that time.
Q. Where did you live?
A. On the north side.
Q. Can you give the address?

Mr. Spector: I object to the line of examination.

A. People I know, and I don't want them to know I am in this predicament.

Mr. Spector: I object to the line of examination and move to strike out the answer.

The Commissioner: How much answer has he made? I sustain his objection.

Mr. Spector: And strike out the answer?

Mr. Hughes: Any answer this man makes we want in this deposition. What is the ruling of the court on the motion to strike out?

The Commissioner: I won't strike.

Mr. Hughes: He moved to strike. When did you first come to Florida?

A. In March, 1933.

Q. Is that the first time you were ever in the State of Florida?

A. I have been here before.

Q. When were you here before?

A. During the boom boom days.

Q. In the boom days?

A. Yes, sir, 1932—I mean.

Q. Where were you during the boom days?

A. Around Miami.

Q. How long were you in the State of Florida at that time?

A. Some little time.

[fol. 121] Q. Were you in business with anyone at that time?

Mr. Spector: I object to that question. I ask the Commissioner to reserve my rights to renew these objections before the Court to which this deposition is read.

A. I was making book on the horses, living at the Spanish Village.

Q. How long did you remain at that time?

A. About three months, I imagine.

Q. Do you know what year that was?

A. In '28, I think it was.

Q. Were you associated with anyone in that business down there during that time?

A. No one particular.

Q. Well, anyone?

Mr. Spector: I object to the question as not being within the scope of the commission.

The Commissioner: I overrule the objection.

Mr. Spector: Exception.

Q. Go ahead and answer the question.

A. I didn't associate.

Q. How long did you remain in Florida at that time?

A. I should say about three months.

Q. Were you ever back to Florida before March, 1932?

A. No.

Q. Then you have been in Florida only two times, is that right?

A. I was in Florida once before that.

Q. Do you remember what year that was?

A. I must have been about '27 or 26, if I recall, during the storm.

Q. In '26 or '27 during the year of the storm?

A. That is right.

Q. What year was it when you were in the book-making business?

A. In '28.

[fol. 122] Q. Then after '28 you were not in Florida until you came back in March, 1933?

A. Yes, sir.

Q. And prior to that time you had only been in Florida one time?

A. That is right.

Q. Now, where were you living prior to the time you made the trip to Florida in '28?

A. I lived in the Spanish Village; I can't recall the name of the hotel.

Q. And you were there about how many months?

A. About three months.

Q. Now, where did you come from when you came here?

Mr. Spector: I object to this line of examination.

The Commissioner: I don't think; I will allow against him.

The Witness: I haven't got anything to hide.

Mr. Spector: It isn't a question of hiding.

Q. Where were you living at the time you came to Florida in '28?

Mr. Spector: I object to that.

The Commissioner: I sustain the objection.

A. I came——

Mr. Spector: Just a minute; don't answer it; it is sustained.

Q. Well, from 1928 till March, 1932, you were in Florida, is that correct?

A. No, sir.

Q. Where were you living in March, 1932?

A. I lived in an apartment on a boulevard there in Florida, on the 1800 block.

Q. What city?

A. In Jacksonville. When I first came down here, you mean?

Q. Yes.

A. I lived in an apartment on the boulevard in Jacksonville, Florida.

Q. About the 1800 block?

A. Yes, sir, about the 1800 block.

[fol. 123] Q. Where did you come from when you came to Florida, in March, 1932?

A. I came from New York.

Q. From New York; how long had you been in New York prior to coming down to Florida?

A. Probably a year, or better.

Q. You had been living in New York about a year at that time. Now, did you come with yourself, or with somebody when you came here?

A. By myself.

Q. Did you drive, or come on the train?

A. I came down on the train.

Q. What time did you arrive in Jacksonville?

A. In the morning—I can't recall the time; about 9 or 10 o'clock.

Q. Do you recall the date when you left New York?

A. I do not.

Q. You came down from New York to Jacksonville?

A. Yes, sir.

Q. And you came by yourself?

A. Yes sir.

Q. Was there anyone on the train that you knew?

A. No, sir.

Q. You had no conversation with anyone down here that you knew?

A. I probably met people whom I knew that was coming down to Florida.

Q. Well, do you recall anyone now that you knew?

A. I can't recall, but I don't know who, now.

Q. Where did you board the train in New York?

A. In the Pennsylvania Station.

Q. Was anyone with you that you knew, at that time?

A. No, sir.

Q. Where were you living in New York at the time you went to the Pennsylvania Station?

A. I lived in Brooklyn, with some friends.

Q. Well, give us the address.

A. I would sooner keep the address out of it; it isn't very important.

[fol. 124] Q. Well, were you keeping house yourself, or living with someone?

A. I was living with someone.

Q. Do you know the name of the party you were living with?

A. Yes.

Q. When did you first decide to come to Florida?

A. I can't set the date.

Q. Well, how long before you came, approximately?

A. Probably two weeks, or so.

Q. Probably two weeks. Well, how did you reach the decision to come to Florida, what influenced you?

Mr. Spector: Just a minute. Mr. Commissioner, I think at this time a warning should be given to this prisoner that any statements he makes pertaining to himself and to this indictment, that he has a right to refuse to answer, on the ground that it would tend to incriminate him.

The Commissioner: I think he has been warned sufficiently.

Mr. Hughes: Repeat the question.

Mr. Spector: I will say this——

Mr. Hughes: I object to counsel making a statement.

Mr. Spector: Well, the witness has the right to state he does not have to answer.

The Commissioner: He has been so warned.

Mr. Spector: All right; you have the right to refuse to testify.

Mr. Hughes: Go ahead, Mr. Gillman.

A. It is a long time to remember.

Q. Well, give us your best recollection about it.

A. I can't recall the details very well right now.

Q. Well, did anyone talk to you about coming to Florida before you came?

A. Yes, sir, someone talked to me about it.

[fol. 125] Q. Well, who was it that talked to you?

A. I would rather eliminate the name at this time.

Q. But you have stated, Mr. Gillman, that you know all these parties that had any connection with this. Do you

know the name of the party that talked to you in New York before you came down here?

A. That is a hard question to answer.

Mr. Hughes: I insist on the witness answering, unless he makes some reasonable explanation or reason why he shouldn't answer the question.

The Commissioner: I think he should answer the question.

Q. Can you answer the question?

A. It is a difficult question to answer.

Q. Well, give us the best answer you can make to it.

A. I can't very well remember that question very well.

Q. You mean to say you don't know who talked to you about it, is that what you mean to say?

A. That is it.

Q. How many people talked to you about coming down to Florida before you came?

A. Well, there was a lot of people talking about coming to Florida, getting away from the cold climate.

Q. Well, about this particular transaction, about how many people talked to you about coming down here on that?

A. People talked to me about a liquor transaction.

Q. About what kind of a transaction?

A. About a liquor transaction.

Q. Who talked to you about the liquor transaction?

A. I would sooner not tell who they were; it might tend to incriminate me.

Q. Do you remember who they were?

A. Yes, I remember.

[fol. 126] Q. Well, what was the result of those conversations, that you came to Florida?

A. It is.

Q. Was anyone to come with you, or were you supposed to meet someone down here?

A. I was supposed to meet someone down here.

Q. Who were you supposed to meet down here?

A. Met a party by the name of Charles Harris.

Q. Charles Harris?

A. Yes.

Q. Where did you first see Charles Harris?

A. First met him in Detroit.

Q. Had you seen him in Detroit before you came down?
A. I met him down here.
Q. Was that his true name?
A. So far as I know.
Q. How long did you know him?
A. For several years.
Q. Well, did he come down here with you?
A. Not to my knowledge, no, sir.
Q. How long had you been in Jacksonville when you met him?
A. I met him about two days after I arrived.
Q. Two days after you arrived?
A. Maybe the following day.
Q. Did he stay at the apartment with you?
A. No, sir.
Q. How did you come to go to the 1800 block on Boulevard?
A. I happened to know a young lady.
Q. What was the name?
A. Why mention the name and get innocent people mixed up in this; that is the gospel truth.
Q. Now, Mr. Gillman, you testified here that you knew all the parties that were connected with this transaction in which some money was taken out of the Florida National Bank through the account of the Almours Securities, In- [fol. 127] corporated. When did you first learn that that was to be done?
A. After a number of series of checks went through.
Q. After some checks had gone through?
A. Yes; in the beginning I had no knowledge that it was forgeries.
Q. Well, did you meet all the parties that were connected with it at the time you learned it?
A. I did.
Q. Do you know who had been connected with it up to that time?
A. I couldn't say that I did.
Q. Did you know that there was any such scheme on foot at that time?
A. After the confession, yes, I did; after my arrest.
Q. Was that the first time you knew about it?
A. That is right.

Q. Up to that time you thought this was the rum transaction?

A. Still the rum transaction.

Q. Then, until after your conviction, you didn't know anything about the forgery transactions that were being manipulated against the Almours Securities, Incorporated, in the Florida National Bank?

A. That is right.

Q. Then, if you don't know anything about the manipulation, you didn't know anything about anybody that was connected with it?

A. That is right.

Q. Then all you think——

A. They tried to implicate men of Jacksonville, and Chief Roberts. I was supposed to be connected with some ring in Chicago, and just because I was locked up with one of them they assume just by that coincident—of course, if you have a record, you get mixed up with it; they assume that it is true.

Q. Then you don't assume to say that you know everybody that is connected with it?

A. I think I do.

[fol. 128] Q. Will you name all the parties that you do know?

A. Well, there is Dickson, the Chadwicks, Carr—I didn't know Chadwick until my arrest.

Q. You had never met Chadwicks until the time of your arrest?

A. That is right.

Q. Till then you didn't know he was connected with it?

A. No, sir.

Q. How many of them had you met before your arrest?

A. I knew Dickson slightly; I knew Carr, and I knew Goldberg. You can give Goldberg my compliments.

Q. Why do you say that?

A. Because I am saying he was a good fellow, a square shooter, and I probably wouldn't hesitate to take the stand against him.

Q. That is all you knew of the fellows connected with the transaction. You didn't know Chadwick, the boy in the bank, had any connection with it at that time?

A. No, sir.

Q. Not until after your arrest?

A. That is right.

Q. And so far as you know now, he didn't have any connection?

A. That is right.

Q. You didn't know David Chadwick, and so far as you know, Mr. Gillman, they had no connection with it?

A. No, sir.

Q. But you did know Dickson and Leo Carr and Goldberg?

A. Yes, sir.

Q. And those are the only parties you can say had any connection with the transactions?

A. That is all.

Q. If anyone else had any connection, you didn't know about it?

A. Not to my knowledge.

Q. Did you discuss it with the parties you did know before your arrest?

Mr. Spector: Just a minute. I want to object on behalf of the prisoner on the ground it is a violation of his constitutional rights.

[fol. 129] The Commissioner: Well, he has been warned.

Mr. Spector: I think the man should be warned and rewarned.

Q. Do you know the parties who are named in the indictment who the attorney has asked you about?

Mr. Spector: Look at the names.

Mr. Hughes: I am asking the question.

A. The ones that had been arrested, you mean?

Q. The ones named in the indictment.

A. I do not know all the names, no, sir.

Q. Have you ever seen the indictment?

A. I think I read it one time. Didn't you read it once, Mr. Main?

Mr. Main: I don't know whether you saw this one, or not.

Mr. Hughes: Counsel has asked you about whether a party who he has identified by a photograph had any connection with the transaction.

The Witness: I don't know anything about the indictment.

Q. Was that before December, 1932, or after December, 1932?

A. I couldn't say, Mr. Main.

Q. You don't know whether you have seen the indictment that counsel mentioned to you?

A. I know Mr. Main reading an indictment, but I don't know the date; do you recall, Mr. Main?

Mr. Main: We had one, but it wasn't this one.

Q. So far as you know, you have not seen the indictment which has been referred to by counsel?

A. No, sir.

Q. You were not before the Grand Jury—this indictment which has been referred to you was returned in the December Term, in January, 1933; where were you in January, 1933, that is this year, this last year?

[fol. 130] A. I was in the County Jail, Duval County, and came down here on the 20th of January.

Q. Did you ever appear before any Federal Grand Jury in Jacksonville or any other place in the Southern District of Florida?

A. I appeared in the Federal Court and entered a plea before Judge Strum.

Q. And that is the only time you ever appeared?

A. Yes, sir.

Q. Do you know who appeared in the indictment in the Federal Term, 1933?

A. Carr was indicted; Goldberg was indicted, and Chadwicks were indicted.

Q. You didn't testify before that Grand Jury, did you?

A. No, sir.

Q. Do you know what charges that Grand Jury made in that indictment?

A. Plenty of charges.

Q. Well, do you know what charges were made?

A. I would have to have an encyclopedia to figure that out. How many counts was there, about forty some-odd counts?

Q. You don't know who all was indicted by that Grand Jury, do you?

A. Not all, I don't know; they read off a lot of names.

Q. Do you know who appeared before the Grand Jury as witnesses?

Mr. Spector: I object to that; those things are secret.

Q. Do you know?

A. I don't know.

Q. How long did you remain out on the Boulevard in the 1800 block?

A. I can't recall right now; probably two months or so.

Q. Had you passed any of these checks while you were living out there?

A. No, I don't think so; I can't remember, it is a hard thing to remember.

[fol. 131] Q. Do you remember the date you first took a check to one of the banks there?

A. It must have been some time in April.

Q. Where were you living at that time?

A. Jacksonville Beach, probably.

Q. When did you first move to the Mayflower Hotel?

A. I never lived in the Mayflower Hotel.

Q. The Seminole Hotel?

A. I never lived in the Seminole Hotel; I used to go up to see the boys, but I never lived there.

Q. What did you go up to see?

A. I would sooner not answer that question.

Mr. Hughes: You can always make that answer. Do you know what room number you saw these people in?

A. It was on the 9th or 10th floor.

Q. Well, did you go on both the 9th and 10th floors?

A. No, sir, it was on one floor.

Q. Well, you were living down at Jacksonville Beach at that time, or had you seen them in the Seminole?

A. I may have lived in Jacksonville Beach or at the apartment on the Boulevard.

Q. Do you know about when you moved down to Jacksonville Beach?

A. No, sir, I do not.

Q. Where did you stay at Jacksonville Beach?

A. At the Cassa Marina Hotel.

Q. What room number did you have?

A. I can't recall that right now.

Q. Well, who was stopping at the Cassa Marina there with you at that time?

A. John Dickson was stopping there.

Q. Were you down there on April 27th, 1932, at the Cassa Marina Hotel?

A. April? What April was that?

Q. April 27, 1932.

A. I imagine; I don't know; I can't recall.

[fol. 132] Q. Did you know a man there at that time by the name of Arthur Starke?

A. Pardon me. While I was in the Cassa Marina, I used to spend a lot of time in the 1800 block at the Oaktrees Apartments.

Q. That is back in the City of Jacksonville?

A. Yes, sir.

Q. And that is while you were registered at the Cassa Marina Hotel?

A. Yes, sir.

Q. You used to spend time there. Did you know a man by the name of Arthur Starke that registered down at the Cassa Marina Hotel?

A. No, sir.

Q. What room did you have at the Cassa Marina Hotel down at the Beach?

A. We had several rooms down there.

Q. The Beach is about eighteen or twenty miles from where you had your apartment at the City of Jacksonville?

A. Yes, sir.

Q. You say "we" had several rooms down there. Who do you mean by saying "we"?

A. John Dickson and I had a room down there, and that was all.

Q. Well, did you and he have several rooms?

A. No, sir, I think I moved there once or twice.

Q. From one room to another room?

A. Yes, sir, but I could not tell you the numbers now.

Q. When you say "we," did you mean anybody else besides John Dickson?

A. No, sir.

Q. Do you know Arthur Kassin, who registered at the Cassa Marina Hotel at that time?

A. All I knew there was John Dickson.

Q. If Arthur Kassin was there, you didn't know it?

A. No, sir.

Q. If anybody was registered by the name of Arthur Starke, you didn't know it?

A. No, sir.

Q. What names were you going under at that time?

A. I went under the name of Duffin.

[fol. 133] Q. What name was Dickson going under?

A. George Lee.

Q. In your part that you played in this transaction, did you ever contract anyone other than John Dickson, talk with anyone other than John Dickson?

A. I talked with Charlie Harris.

Q. Was John Dickson also known by the name of Patrick Corbett?

A. Yes, sir.

Q. You knew him by that name, did you?

A. I don't recall his last name.

Q. Well, the only men you talked to in this transaction was John Dickson and a man by the name of Harris, is that right?

A. That is right.

Q. Did you ever talk to Goldberg about it?

A. I talked to Goldberg, yes, sir.

Q. Did you ever talk to Leo Carr about it?

A. I did.

Q. Who else did you talk to about it?

A. That was all.

Q. Was that before or after your arrest that you talked to Goldberg?

A. Before my arrest.

Q. And this man John Harris?

A. Charlie Harris.

Q. Is that his correct name?

A. So far as I know, it was.

Q. Where did you have your conversation with Charlie Harris about it?

A. He was the go-between the rest of them.

Q. Who do you refer to, between the rest of them?

A. Goldberg and Carr.

Q. And you and Dickson, is that what you mean to say?

A. Yes, sir.

Q. Well, you conversed with Goldberg and Carr personally about it, didn't you?

A. Why bother those people who have nothing to do with it? The one you want to get is Goldberg; I am giving you [fol. 134] facts. Forget those boys; he had nothing to do with it; just another one they are trying to send to the sweater, just like Chapman says someone in Jacksonville is starting a rumor that I was going to pay off Chapman.

Q. You know Goldberg?

A. Yes, sir.

Q. So far as you're concerned, Goldberg is the only man you would be interested in getting, is that right?

A. That is right.

Q. How do you know about whether the rest are innocent or guilty?

Mr. Spector: I object to that; it is just a debate between the witness and the prosecutor.

A. It is my honest, candid opinion they didn't have anything to do with it.

Q. Well, until your arrest, I believe you stated you didn't know what the transaction was all about.

A. That is very true. They tried to implicate a man by the name of Seeman.

Q. You know Seeman?

A. No, sir.

Q. You are just testifying what you heard about it, or know about it? Do you know Seeman?

A. I don't know him, but I know what connection—I know he didn't have anything to do with it.

Q. You didn't know Chadwick, the Chadwick brothers were either, did you?

A. I didn't know the Chadwick brothers.

Q. Do you know the party who you talked to in New York before you came down here about this? You don't have to name them; I am asking if you know them.

A. I would sooner not answer that question.

Q. Did you talk to parties in New York before you came down here?

A. Oh, I talked to a lot of parties in New York.

[fol. 135] Q. Well, will you name the parties who you talked to in New York?

A. I can't recall at the present time, it is very far; too much time has passed, but I would like to see innocent people get free of it.

Q. The ones you think are innocent, is that what you mean to say?

A. That I believe are innocent.

Q. Were you ever down in St. Augustine in connection with this matter?

A. I can't recall.

Q. Do you know the Monson Hotel in St. Augustine?

A. Yes sir.

Q. You didn't stay there when you were down here in 1928? When did you first know of the Monson Hotel, in St. Augustine?

A. I can't recall that; I had a lunch there a couple of days.

Q. Where did you first learn of the Monson Hotel in St. Augustine?

A. I knew the hotel for some time.

Q. You were in the hotel for some time?

A. I knew of the hotel for some time; I stopped there, too.

Q. When did you first stop there?

A. I can't recall the times.

Q. Well, was it in 1928?

A. No; I stopped there this year—last year, rather.

Q. In 1932?

A. Yes, sir.

Q. Who did you go there to see, in the Monson Hotel?

A. I knew a couple of girls around there.

Q. Is that all the parties you knew?

A. That is all.

Q. Do you know a man there by the name of Rice, T. H. Rice?

A. No, sir.

Q. Did you know anybody by that name in this transaction?

A. No, sir.

Q. Did you know a man there by the name of Archer Stern, or Archer Stark?

A. No, sir.

[fol. 136] Q. Were you ever around the St. Augustine National Bank?

A. I might have passed by there.

Q. Did you ever go by there for any transaction?

A. No, sir.

Q. Do you know anything about a safety box transaction at the St. Augustine National Bank?

A. I did not, but I wish I did.

Q. Why do you say that?

A. Why, a lot of things.

Q. Do you believe that Goldberg had a safety box down there?

A. On the testimony that I heard, and the statements made.

Q. Do you know the name under which Goldberg went while at the Monson Hotel?

A. I don't know anything about that.

Q. Do you know that Leo Carr was down at St. Augustine?

A. Not that I know of.

Q. Ever see him down there?

A. No, sir, I did not.

Q. Did you know where this money went to that you were cashing the checks for?

A. Where it was going for?

Q. Who was getting the money?

A. I don't know where it is going to yet.

Q. What did you do with the money when you would cash one of these checks?

Mr. Spector: I think at this time we ought to warn this witness.

A. There is no money left; it disappeared; evaporated. That is ancient history. The question is about those people that are implicated; I say no.

Q. You say you didn't know them?

A. You can't have the entire world in it.

Q. Did you know anything about the safety deposit box in the St. Augustine National Bank?

A. Not until after my arrest.

[fol. 137] Q. Did you know at the time that safety deposit was rented down at St. Augustine that Leo Carr and Archer Stark and Jack Seman were registered there at the Monson Hotel?

A. So far as I know they weren't. I was only at the Monson Hotel once or maybe twice, and I never seen anybody there connected with the transaction.

Q. Did you go down to St. Augustine by yourself?

A. I drove down with a young lady.

Q. Was that the same young lady you knew in St. Augustine?

A. The same one, yes.

Q. Did you talk to anybody connected with this transaction in St. Augustine?

A. No, sir.

Q. So far as you know the St. Augustine angle of it didn't exist?

A. It didn't exist. When he took the stand and testified he saw me down at the beach at a bungalow—I knew there was some place, but it goes to show you how a witness can take the stand and make a statement.

Q. Mr. Gillman, you stated you were present at all the transactions?

A. There may have been some that I wasn't present at.

Q. But if any transactions took place at the bungalow down at the Beach, or down at St. Augustine, you weren't present?

A. I wasn't present.

Q. Were you present at any conversation or conference before your arrest where it was talked about the passing of these checks on the Almours Securities, Incorporated, account?

A. I can't answer that question.

Q. You mean you don't want to answer it, or you can't?

A. I can't very well answer it. When that first took place, I thought it was a liquor deal.

[fol. 138] Q. Until your arrest, then, you didn't know anything about the forgeries?

A. That is right.

Q. Then if there was any conversation took place about the forgeries on the part of the Almours Securities, Incorporated, then you were not present, prior to your arrest?

Mr. Hughes: I think that is all.

——.

Examination taken, reduced to writing and by the witness subscribed and sworn to this 22nd day of June, A. D. 1933, before ——, Commissioner.

———

Mr. Siegel: Now, Mr. Kassin. We want to call Mr. Kassin for just a question.

Archie Kassin, the defendant, having been heretofore duly sworn, recalled, testified further as follows:

Direct examination.

By Mr. Siegel:

Q. Mr. Kassin, testimony was adduced here by a witness from Florida to the effect that one Jerome Goldberg and

you walked into a bank in Florida. Do you remember that testimony?

A. I remember that testimony, yes.

Q. Now, did you walk in together with a man by the name of Jerome Goldberg, into this bank in Florida?

A. No, sir, I never did.

[fol. 139] Mr. Siegel: The name of this bank is the St. Augustine National Bank?

Mr. Creel: As I recall it, yes.

Q. Did you walk into the St. Augustine National Bank at any time with a man by the name of Jerome Goldberg?

A. No, sir.

Q. Do you know this Jerome Goldberg?

A. No, sir.

Mr. Siegel: Your witness.

Mr. Creel: No questions.

Mr. Siegel: A commission has been issued to take the testimony of Jerome Goldberg. Pursuant to that deposition Mr. Irving LaDeutscher, a member of the Bar of the State of New York, went down to Florida. He there saw Mr. Jerome Goldberg, who refused to make any statement under oath in this case, and I would like to have Dr. LaDeutscher make a statement to your Honor in this connection.

Mr. LaDeutscher: Your Honor, I went down to Florida——

The Commissioner: Let Mr. LaDeutscher be sworn.

IRVING LADEUTSCHER, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Siegel:

The Witness: I went to Florida for the purpose of obtaining a disposition of one Jerome Goldberg, who is at the present time incarcerated in the Duval County Jail, Florida, [fol. 140] and Jerome Goldberg decided that in view of the fact that he himself is at the present time awaiting trial in connection with this matter, that it would be advisable

for him at the present time not to make any deposition in connection with the matter in question.

Mr. Creel: I have some questions, your Honor.

Mr. Siegel: Well, I don't think any questions should be asked of Dr. LaDeutscher. Our purpose in presenting this matter to you is to show exactly what happened with regard to the deposition and to show that we attempted to take it in good faith and to show how it was that it was not taken.

The Commissioner: I think I will take the questions.

Mr. Siegel: All right.

Cross-examination.

By Mr. Creel:

Q. Mr. LaDeutscher, before you were ready to take the deposition of Jerome Goldberg, did you ask to see him in the Duval County jail?

Mr. Siegel: I object to it, your Honor.

The Commissioner: No, I will let him inquire.

Mr. Siegel: Exception.

The Commissioner: He has testified. Now you may cross-examine.

The Witness: Repeat the question, please.

Q. Did you see Jerome Goldberg before you were prepared to take the deposition? Did you see Jerome Goldberg in the Duval County jail?

A. I did, yes.

Q. Did you ask him about Archie Kassin?

A. No.

Q. Did you ask Jerome Goldberg if he knew a man by the name of Archie Kassin, or by any other alias?

[fol. 141] A. No, I did not ask Archie Kassin any questions in connection with the deposition. May I elaborate on that question? I went down—before I could gain admission to see him, I saw the local District Attorney there and he told me that I could see this man if I went down to the County Jail together with the local Department of Justice man. I said certainly, and we went down together and the Department of Justice man was sitting together with Goldberg and myself throughout this conversation. There was nothing taken down stenographically. There was a general conversation indulged in by the three of us, and after

I got through with our conversation there both I felt and Goldberg felt that it would be best not to take any deposition so far as he was concerned. I mean the man was in no position to testify.

Q. Did you, Mr. LaDeutscher, ask Goldberg point blank whether Goldberg knew Kassin?

A. No, I did not ask him point blank whether he knew Kassin.

Q. Did Goldberg make any reply that of course he did know Kassin?

A. He did not make any reply to any question of mine in connection with that thing. We were discussing Kassin generally in connection with this deposition, and the exact answers to his questions I do not recall at this time. There was nothing taken down stenographically, it was just a general conversation.

Mr. Siegel: Who was present other than you and Goldberg at this time?

The Witness: A Department of Justice man.

Q. Was that Department of Justice man a man by the name of Alt?

A. I don't recall his exact——

Q. R. A. Alt?

A. I believe that was his name.

[fol. 142] Q. You are under oath, aren't you, doctor?

A. I am under oath, yes.

Q. You want this Court to believe that testimony that you previously have given?

A. I want this Court to believe everything that I have said here. I am testifying to the best of my recollection of what transpired down there. It was I who requested to have a Department of Justice man present when I interviewed this man. I made that request to Mr. Paisley down there.

Q. Did you, doctor——

A. Pardon me. Before even attempting to see Goldberg, I went to the local marshal there and from him I went to the District Attorney, and I never was alone with this man at any time. I did not go down there to interview this man with any purpose of doing anything excepting getting the deposition from him.

Q. Did you, doctor, ask Goldberg, whether you could assist him in obtaining a local lawyer to defend him?

A. I did. I also asked him whether there was anything that I could do for him. I happened to know Goldberg for years prior to this matter having come up. That was why I went down to get a deposition. I know the man.

Q. Doctor, when you saw Goldberg in the Duval County Jail——

A. Yes.

Q. Did you ask Jerome Goldberg if he knew Archie Kassin?

Mr. Siegel: I object to this.

The Witness: I will answer that.

Mr. Siegel: But I object to it on the ground it is incompetent, irrelevant and immaterial and as causing this hearing to go off on a tangent and on a collateral matter.

Mr. Creel: Your Honor, it explains the reason why this commission was not filled.

[fol. 143] The Commissioner: Objection overruled; I will let him answer.

Mr. Siegel: Exception.

The Witness: I wish to get this matter cleared up as to the statements I have made. May I say something off the record here?

Mr. Creel: On the record.

The Witness: I do not want to be put in the position where the veracity of any statements is being questioned or the motive of my statements are being questioned.

The Commissioner: Well, all we want here is what occurred there, what was said, that is all. Let the motive stand aside.

Q. Can't you answer that question?

A. What is the question? Did I ask Jerome Goldberg whether he knew Archie Kassin?

Q. Yes.

A. The answer to that is no.

Q. Didn't Jerome Goldberg tell you that he had known Archie Kassin for over twenty years?

A. Jerome Goldberg told me——

Mr. Siegel: I object to that on the ground it is incompetent, irrelevant and immaterial, and hearsay.

The Commissioner: I will take it.

Mr. Siegel: Exception.

A. (Continuing:) Jerome Goldberg told me that he had known a man by the name of Kassin for over twenty years, but the man he knew as Kassin had nothing whatsoever to do with this crime. That is what he told me in the presence of the Department of Justice man. He personally stated that, too, before the man——

Q. You saw him——

Mr. Siegel: Let him finish.

[fol. 144] Q. You did ask?

A. I did not ask; I went down there—so far as I can remember, the conversation verbatim that took place several weeks ago, I said I came down here for a dual purpose, I came down here for the purpose of getting a deposition from you and see what I could do for you.

By the Commissioner:

Q. Well, now, listen. Did you have a photograph of Kassin?

A. Did I have a photograph of Kassin?

Q. Yes.

A. I had no papers with me. I walked into this place——

Q. I asked you did you have a photograph? Did you have a photograph with you?

A. I don't know whether I had a photograph with me or not.

Q. What elicited the answer that he knew a man named Kassin for twenty years; if you did not ask a question, what elicited that answer?

A. I did not.

Q. You just said that he knew a man for twenty years by the name of Kassin? What elicited that answer if you did not ask him anything?

A. Because when I said I came down here for the purpose of taking a deposition with reference to a man by the name of Arthur Kassin——

Q. Yes.

A. Then I don't remember exactly what took place, the intermediary conversation, before that answer was elicited. Your Honor, I would not ask him that question point-blank

that way, especially in the presence of a Department of Justice man, because if he had said—I went down there in the interests of this defendant, and if he had said, if I had asked him that and he had given me that answer, I would not have taken the deposition anyway, I would have been very careful not to ask any such point-blank question.

[fol. 145] Q. Well, after all, that is what you went there for.

A. And to the best of my recollection I did not ask that question.

By Mr. Creel:

Q. Well, do you wish to qualify your answer that it is to the best of your recollection that you did not ask that question?

A. Well, all of my testimony here is to the best of my recollection.

Mr. Siegel: May I clear this up, your Honor?

The Commissioner: When Mr. Creel is through, you will have your opportunity.

Mr. Creel: No more questions, your Honor.

Redirect examination.

By Mr. Siegel:

Q. Do you remember distinctly this Jerome Goldberg saying to you with reference to a man by the name of Arthur Kassin that this man, Arthur Kassin, had had nothing whatsoever to do with any defaulting of the bank in Florida, or any participation in any criminal acts with Jerome Goldberg?

A. I distinctly remember that he told me that in the presence of Mr. Alt.

Q. Yes.

A. That this man had nothing whatsoever to do with—this man whom he remembered or whom he knew as Arthur Kassin had nothing whatsoever to do with any of the matters that he was charged with. He told me that right in the presence of the Department of Justice man. We were sitting as close as we three are now together.

Mr. Siegel: That is all.

Mr. Creel: One more question.

Recross-examination.

By Mr. Creel:

Q. Mr. LaDeutscher, did you ask Goldberg in the course of the conversation you had in the Duval county jail whether [fol. 146] he knew Archie Kassin, Arthur Kassin, Arthur Starke?

A. No, I did not even know them.

Q. Archie Starke, Archie Stone or Harry Stern?

A. Did I ask him whether he knew any of those people? I did not ask him whether he knew any of them.

Mr. Siegel: Well, the answer to that is no, that he did not ask him.

The Witness: I did not.

By Mr. Siegel:

Q. What did Mr. Jerome Goldberg say, if anything, about giving sworn testimony? Why didn't he want to give sworn testimony?

A. The sum and substance of his reasons for not wanting to give sworn testimony was because he himself was facing trial shortly and he did not want to be put under oath and lay himself open to cross-examination in connection with the matter.

Q. Did he say to you that if he gave testimony in this case, that the cross-examination in this case would open the door to all of his activities and give away his defense in this case?

A. In substance, that was the burden of our conversation.

Mr. Siegel: That is all.

Mr. Creel: That is all.

Mr. Siegel: We rest, your Honor.

Mr. Creel: Your Honor, at this time I would like to offer in evidence a copy of the commission which was forwarded to the United States Commissioner at Jacksonville, Florida, together with the covering letter from the United States District Attorney's office, Southern District of Florida. This letter was received by me, together with the commission.

[fol. 147] Mr. Siegel: I object to the covering letter. It certainly hasn't anything to do with this case. I mean it is immaterial and it is hearsay. If they want to take a deposition of this man or call him as a witness——

Mr. Creel: It has a direct bearing on Dr. LaDeutscher's testimony.

Mr. Siegel: I wish your Honor would not read it. I do not mind the order, but the letter. I mean I do not object to the order, in fact it is already in evidence.

The Commissioner: I have not read the letter.

Mr. Siegel: The papers on which the commission issued can all be permitted in evidence. Now, may I say this to the Commissioner, so far as we are concerned, to show our own good faith here, we are willing to surrender Archie Kassin immediately, and we would like an opportunity within three days or what time you wish, without any further delay in the case, to give you our idea of the law of this case. It raises, or we believe that the record shows 100 per cent.; I mean this is our opinion and we want to support it by the minutes —we have ordered the minutes in the case—we believe that your Honor has no alternative in this case but to refuse removal, and we would like to have the opportunity of presenting this to you without any further delay. Certainly nobody can be harmed by the surrender of this defendant, and we now formally surrender him.

The Commissioner: And do you rest?

Mr. Creel: No; the Government has not rested, and it would like to call an additional witness whose testimony will have a direct bearing on the affidavits that are on file before you. I call Roger L. Main.

[fol. 148] Roger L. Main, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Creel:

Q. Mr. Main, what is the nature of your employment?

A. I am special agent of the Division of Investigation, United States Department of Justice.

Q. How long have you been so employed?

A. Since March 25, 1926.

Q. Where are you stationed?

A. Jacksonville, Florida.

Q. Have you had occasion to make an investigation in the case against David Chadwick, Jr., Archie Kassin, and others?

A. Yes, sir, I made an investigation in this case.

Q. Have you in the course of your investigation ever had any conversation with David Chadwick, Jr., and John Dickson, whose affidavits are on file before this Court?

Mr. Siegel: I object to that, your Honor, as immaterial, as hearsay and incompetent.

The Commissioner: No, I will allow it.

Mr. Siegel: As to what this man not under any oath told him.

The Commissioner: It will throw some light on it. He is an investigator, and if he spoke to them, what they said is good evidence.

Mr. Siegel: If that was not under oath, it is not admissible in the case, and the witness Main was cross-examined, and suppose any witness in the case—this is a year and three months have gone by—stated anything orally and not under oath, would you allow that here on a thing of this kind?

[fol. 140] The Commissioner: I allowed the depositions, and anything that would go to the credibility of the depositions I would take in.

Mr. Siegel: But there was cross-examination there.

Mr. Creel: Do I understand your Honor has ruled on this?

The Commissioner: Yes.

Mr. Siegel: Exception.

A. Yes, sir, I talked to him.

Mr. Siegel: May we have the time and place, your Honor?

The Commissioner: Yes.

Q. Mr. Main, in all of these conversations, will you fix the time and place? Now, when did you hold your first conversation with David N. Chadwick, Jr., in regard to this case and the part which Archie Kassin played in that case?

Mr. Siegel: I object to that as hearsay, incompetent and immaterial.

The Commissioner: I think it will throw light on the case.

Mr. Siegel: Exception.

A. The first time I talked with David N. Chadwick was the latter part of June or shortly after the middle of June, and he was removed to Jacksonville, Florida, from Wilmington, North Carolina. At that time there was no discussion of

Archie Kassin in this case. Archie Kassin was not known in the case.

Mr. Siegel: Will you fix the date?

The Witness: Right after the middle of June.

Mr. Siegel: The year?

The Witness: 1932. That was in the office of the Division of Investigation at Jacksonville, Florida, and a few days later David N. Chadwick was again brought to the Jack- [fol. 150] sonville office for an interview, and at that time he admitted knowing two of the defendants but made no reference to Archie Kassin. About three weeks later, in the Duval County Jail, after the investigation disclosed other participants in this case, I questioned David N. Chadwick concerning a man named Arthur Starke and Arthur Stern. Chadwick stated later on he did not see why we wanted to take up time with him because he only had a minor part in it and did not know whether he wanted to disclose his identity. At that time he did not disclose his identity, and in fact it was not until October, 1932, at the Duval County Jail I talked to David N. Chadwick, and David N. Chadwick said he had discussed this case with his lawyer and had decided that he was going to furnish the Government some information on all the defendants or all the people that were in this forgery scheme, and that he was ready to give some information about Arthur Stern and the man named as Arthur Starke. He said he would furnish his name and would later furnish his address and give a name under which he had been arrested in New York, so a photograph could be obtained. On that occasion he said Arthur Starke was Archie Kassin. That was all he would say as to Kassin's participation in the case at that time. I would interview him every two or three days at the Duval County Jail, and shortly after that he told me that Archie Kassin was one of the prime movers in this forgery scheme, that Archie Kassin is the man who introduced him to Jerome Goldberg and Leo Carr, at the George Washington Hotel.

The Commissioner: Where?

[fol. 151] The Witness: Jacksonville, Florida. That at that time Archie Kassin was in Jacksonville under the name of Stern at the George Washington Hotel A check of the register of the George Washington Hotel verified this, and

Mr. Siegel: Well, I certainly object to this, Commissioner.

The Commissioner: Yes. It is just a conversation he had.

Mr. Siegel: Exception. It is hearsay and could not be proved in court.

The Commissioner: Yes, so far as residence in the hotel is concerned.

Mr. Siegel: May I say a word? I would like to move to strike out all of this testimony of this man. I think you desire to be fair in this matter, in this respect, that this testimony, all of this happened prior to the time of the introduction in this case of the Chadwick testimony and prior to the time that it was taken. Now, it should have been the basis of this—this is in October, 1932, and the basis of this should have been laid by the Government in the questions asked on cross-examination of the witness. Now, isn't that correct law, Mr. Commissioner?

Mr. Creel: Your Honor, we are prepared to show subsequent inconsistent statements made by Chadwick.

Mr. Siegel: Well, let's strike this out and get in the subsequent inconsistent statements.

The Commissioner: I will strike out reference to the register of the hotel.

Mr. Siegel: I move to strike out all of the testimony given prior to the taking of the deposition of the Chadwick in question, David Chadwick.

The Commissioner: I refuse to so order.

[fol. 152] Mr. Siegel: Exception.

A. On the 25th of November David Chadwick was interviewed.

Mr. Siegel: Your Honor, may I just call your Honor's attention, without intending to be impolite to the witness, that the deposition of David Chadwick was taken on the 26th day of October, 1933, which is a year later than the witness is testifying to, and all of this could have been used on the cross-examination of this witness at that time.

The Commissioner: Where was he cross-examined?

Mr. Siegel: In a deposition that was taken a year later, your Honor.

The Commissioner: He was not cross-examined?

Mr. Siegel: Yes, he was.

The Commissioner: By whom?

Mr. Siegel: By the Government representative. This is what I mean. I don't think your Honor has my point——

The Commissioner: Yes, I have.

Mr. Siegel: Don't you think there—isn't that the proper procedure——

Mr. Creel: Your Honor, this is a removal proceeding; the technical rules of evidence do not apply.

Mr. Siegel: It is not a technicality, it is a question of just common decency, that is all, and common fairness. In other words, these objections of ours are not a bag of bricks. Here is a man examined in October, 1933, Commissioner, and when he is examined they could have brought all this out by this very simple question—didn't you say this, didn't you say that?

The Commissioner: Were you present when the deposition was being taken?

[fol. 153] Mr. Creel: I was not, your Honor. This deposition was taken in Atlanta, it was taken on short notice, the attorneys in Florida who were familiar with the case were not present, the cross-examination was conducted by an Assistant United States Attorney from Atlanta who was unfamiliar with the case.

Mr. Siegel: That would not be any excuse here, your Honor.

The Commissioner: I will take this testimony.

Mr. Siegel: Exception.

A. On November 25th David Chadwick was interviewed in the office of Rogers & Towers, in Jacksonville, and at that time he stated——

Mr. Siegel: The same objection, your Honor, same exception.

The Commissioner: Were you present?

The Witness: I was present, yes, sir. He stated to me that this matter was first brought to his attention—I am referring to the forgery scheme in Jacksonville—at Richmond, Virginia, by Archie Kassin, and at that time Archie Kassin was using the name of Archie Stone. He went along to say that he was in difficulties in Richmond, Virginia, and that Kassin had arranged for his bond and that Kassin had threatened to go off of his bond unless he made his brother, in the Florida National Bank, furnish the name of an account that would stand a forgery scheme and assist in putting across a forgery scheme on that account. Chad-

wick claims that Kassin told him that he would have to come off his bond unless he would co-operate in that. Chadwick about two days later, in the Duval County Jail, told me that the last——

Mr. Siegel: The same objection, your Honor, and exception.

[fol. 154] The Witness (continuing): —the last known address of Archie Kassin was on West 86th Street, right around No. 200, in New York City, and he said that he knew he lived there up until June. A few days later a photograph was displayed to David N. Chadwick, and David N. Chadwick immediately——

Mr. Siegel: Same objection, your Honor, and exception.

The Witness (continuing): —identified this photograph as Archie Kassin. That is the first direct information we had as to the identity of Archie Kassin. After David Chadwick identified this photograph of Archie Kassin, he elaborated on Kassin's part in this scheme, and stated that Kassin had instructed him to get a check from his brother on the account of Almore Securities, Inc., from the Florida National Bank, and instructed David Chadwick to send this check to Kassin in New York; that he arranged with his brother to get this check and he did forward this check to Archie Kassin in New York, and Kassin returned it in about fifteen days and he later returned it to his brother in the bank. When this case was brought to trial at Jacksonville, that is, when the case against Leo Carr was called for trial and the Grand Jury was in session at Jacksonville, Florida, David N. Chadwick was interviewed in the United States Attorney's office, in the presence of United States Attorney W. P. Hughes and Special Assistant to the Attorney General Wharton and myself. There, David Chadwick again related the circumstances under which Archie Kassin presented this——

Mr. Siegel: Were you present at that time?

The Witness: I was present, yes, sir.

[fol. 155] Mr. Siegel: Same objection, your Honor.

The Witness: —presented this foregery scheme.

Mr. Siegel: I think this is——

The Commissioner: You may have your exception.

Mr. Siegel: That is not very much help to me, Commissioner.

The Witness (continuing): —at Richmond, Virginia, and he related some details as to how he obtained the check from his brother and forwarded it to Archie Kassin in New York. David N. Chadwick then appeared before the Grand Jury in this case; as a matter of fact, there was no case against Archie Kassin until David N. Chadwick——

Mr. Siegel: I move to strike that out.
The Commissioner: Yes.
Mr. Siegel: He certainly would not know that.
The Commissioner: That is a conclusion. Strike it out.

By Mr. Creel:

Q. Before the trial did you have any further conversation?

Mr. Siegel: Fix the date, please, if you don't mind.

A. That was in January, 1933. I can't recall the exact date.

Q. Before the trial of David N. Chadwick did you have any further conversations with him regarding Archie Kassin?

A. David N. Chadwick——

Mr. Siegel: The same exception, your Honor; same ruling and exception.

The Witness: David N. Chadwick pleaded guilty.

[fol. 156] Q. After Chadwick was incarcerated in Atlanta, after his sentence, you again saw him?

Mr. Siegel: What date was that?
The Witness: I saw him in June, 1933.
Mr. Siegel: Yes.
The Witness: In Georgia.
Mr. Siegel: Yes.
The Witness: It was about the time—it was the same day that a deposition was attempted to be taken from Leo Carr and John Dickson. It was that afternoon. I think it was around——
Mr. Siegel: That was some time in June, 1933?
The Witness: Yes.

Q. Did you have a conversation then?

A. I talked to David N. Chadwick at the United States Penitentiary, Atlanta, Georgia.

Q. Will you tell us the substance of that?

Mr. Siegel: Same objection, ruling and exception.

Q. Tell us in detail about the conversation?

A. That conversation was more generally—I was talking to him about conditions in Atlanta, and Chadwick at that time—I don't recall—I mentioned this present defendant, Archie Kassin.

Q. After the deposition of David N. Chadwick was taken——

Mr. Siegel: Just let's fix the time again.

The Commissioner: Well, give him a chance.

Q. Did you have a conversation with David N. Chadwick as to Kassin's part in this crime, and will you fix the date of this conversation and the place?

A. That was in November, 1933.

Q. And may we have the place?

A. At the United States Penitentiary at Atlanta, Georgia. It was——

[fol. 157] Mr. Siegel: Do you know the date exactly?

The Witness: I think on my travel orders it would show, but I am quite positive it was November 20th. I may be off a day or two, but it was right around that time.

Mr. Siegel: Yes.

The Witness: I talked to David N. Chadwick.

Mr. Siegel: I object to this, your Honor, upon the ground it is incompetent, irrelevant and immaterial.

The Commissioner: You may have an exception.

Mr. Siegel: Exception.

A. I asked Chadwick concerning Kassin's part in this offense again. Chadwick was not as elaborate in stating Kassin's——

Mr. Siegel: I object to it.

The Commissioner: Don't characterize it, just tell what he said, if he said anything.

The Witness: Well, Chadwick stated that he appeared before the Grand Jury and testified against Archie Kassin.

Mr. Siegel: I don't care to have anything he testified to.

The Witness: He did not say what he testified to.

Mr. Siegel: He said he appeared before the Grand Jury and testified.

The Commissioner: He can tell what he said.

Mr. Siegel: Exception. All right.

The Witness: He stated that the told the truth when he testified before the Grand Jury as to Archie Kassin and all the others in this case, that at this time he was like a crazy man, he did not know what was the matter with him. I asked him what prompted him to make a deposition in the manner in which he did. He said, Well, I have to be here [fol. 158] and I am trying to get some relief for my family, and he said, This is the only hope I have. He stated further that—I asked him whether or not the Government could still depend on him to testify in this case——

Mr. Siegel: I object to this and move to strike it out.

The Witness (continuing): —against Kassin.

Mr. Siegel: It is more hearsay poison that is being introduced by indirection that should not be permitted here. I claim your Honor has no more right to hear this testimony than to hear any other gossip or hearsay or illegitimate poison that is injected into a case. Your Honor is bound to hear sworn testimony on the issues here. Here is a man that has given a deposition, and I claim that you are bound by his sworn testimony and if the Government wants to change it, it is their duty to issue a commission to take the deposition of this man.

The Commissioner: Well, whatever will throw light on the case I will hear. Apparently this does throw some light on it.

Mr. Siegel: Exception.

The Witness: (continuing): He stated they could, and that if he was taken to Jacksonville he would truthfully testify as he had told me previously as to Kassin's part in this case.

Q. Did you at that time ask him whether an attorney by the name of Spector had seen him previous to the making of the denial?

A. I did. He told me Mr. Spector had been to see him four or five times.

Q. Did you ask him again whether Kassin was involved in the crime?

A. No, I did not, did not go into that detail.

[fol. 159] Q. Now, Mr. Main, did you ever have occasion to talk to John Dickson, a defendant in this case, whose affidavit is on file?

Mr. Siegel: May we have the date, your Honor?

Q. (Continuing) Regarding the activities of Kassin in this crime, and in your testimony will you fix the time and place of your conversation?

A. I talked to John Dickson in the latter part of November, 1932, at Jacksonville, after he had been removed from New York City. It might have been the first part of December, but it was right around the latter part of November or the first part of December, 1932.

Mr. Siegel: Objection, on the ground it is incompetent, it is hearsay, no proper foundation has been laid for the taking of the deposition of Dickson.

The Commissioner: I will take it.

Mr. Siegel: Exception.

The Witness (continuing): The conversation took place at the division office in Jacksonville, Florida. I questioned Dickson concerning all participants in this case. We had just learned of Archie Kassin's connection.

Mr. Siegel: I move to strike that out.

The Commissioner: Yes, strike out what he had just learned. You may give the rest of the conversation.

The Witness: I asked John Dickson if he knew Archie Kassin. He said he did. I asked him what part Archie Kassin had in the forgery scheme. He stated he could not specifically state his part, but he saw Kassin at the Cassa Marina Hotel while he and Gillman were stopping there, and he was told that Kassin had part in it.

[fol. 160] Mr. Siegel: I move to strike out that he was told.

The Witness: Well, that is what he said.

The Commissioner: Strike it out. We are not drawing conclusions.

The Witness: That was all he stated about that particular man. He stated all he knows of Archie Kassin is that he is in New York City, after he had fled, after he, Dickson, had fled from Jacksonville, after the forgery

scheme had been discovered, he said he met Kassin several times at the New York Used Car Exchange in the vicinity of Columbus Circle, and he asked Kassin to send some money to Gillman to assist him in his defense in the State Court. He said he tried to get a thousand dollars out of him. And he also furnished an address—not an address, but a description of a place where he said Kassin had a hangout on West 82nd Street. He said this was in an apartment house and the street floor there was a beauty parlor and Kassin's apartment or the apartment that Kassin was in or stopped frequently at, was the door that entered the apartment just beyond the entrance to the beauty parlor, and he described the house as being a brick structure and number unknown. That was—I don't recall anything else.

Q. Mr. Main, after the deposition of John Dickson, which is on file in this court, was taken, did you have any further conversation with Dickson relating to Archie Kassin and his part in the crime?

A. I had a conversation with John Dickson, yes, sir.

Q. Will you fix the date and place of that conversation?

A. I talked to him the same day the deposition was taken in Atlanta, Georgia, and was present when the deposition was taken.

[fol. 161] Q. Will you tell me what John Dickson said at that time?

Mr. Siegel: Was this before the deposition was taken you spoke to him?

The Witness: It was after the deposition.

Mr. Siegel: It was after the deposition?

The Witness: I did not talk to him before.

Mr. Siegel: All right.

The Witness: I asked Dickson why he had declined to say he knew Archie Kassin, and Dickson said, Well, I told the truth in Jacksonville and it got me in the penitentiary, and he said, Why, it won't hurt me to lie a little bit now; and he would not talk any further.

Mr. Creel: That is all.

The Witness: I had another conversation with John Dickson on the same day that I talked to David N. Chadwick, after the deposition was taken in November, but at that time Dickson made no reference to Archie Kassin.

Mr. Creel: That is all.

Cross-examination.

By Mr. Siegel:

Q. In your conversation with Gillman, I think you testified——

A. Gillman?

Q. Was that the man you said you had a conversation in November, 1933, with the man before this last person?

A. Chadwick.

Q. David Chadwick, yes. Now, with regard to David Chadwick, did you speak to him in November, 1933?

A. Yes, sir.

Q. And at that time did he say to you that Kassin had participated in this crime?

A. At the United States Penitentiary, Atlanta, Georgia.

[fol. 162] Q. I am talking about November, 1933.

A. That was the one, at the United States Penitentiary.

Q. I mean that is the only conversation you said you had with Chadwick after the deposition was taken?

A. That is right.

Q. He did not say to you at that time that Kassin had participated in the crime, did he?

A. He stated that he would testify truthfully, as he had done before the Grand Jury, as to Kassin's part in the matter.

Q. I did not ask you that. What I am asking you——

A. We did not go into details.

Q. Well, just fix the time now. Did he say to you in November, 1933, that David Chadwick told you that Kassin had participated in the crime?

A. I don't recall that he told me that.

Q. Did he in November, 1933, say to you that he knew Arthur Kassin?

A. Yes, sir.

Q. He told you that he knew him?

A. He told me that he knew him.

Q. And he did not say anything to you about Kassin participating in the crime, is that right?

A. Other than my first remark, yes.

Mr. Siegel: That is all. We have no more cross of this witness. I now specifically move to strike out all of the testimony given by this witness with regard to David Chadwick, on the ground that it is utterly irrelevant, it is imma-

terial and incompetent, and it is an improper method of contradicting and impeaching a witness.

The Commissioner: I will deny your motion.

Mr. Siegel: Exception. I make the same motion with regard to John Dickson, with regard to the testimony given by John Dickson, I move to strike out all the testimony given.

The Commissioner: Same ruling.

[fol. 163] Mr. Siegel: Exception. I now move to strike out all of the testimony given by this witness as against David Chadwick and as against John Dickson, which took place prior to the time of the taking of the deposition of both witnesses.

The Commissioner: I deny that motion.

Mr. Siegel: Exception. We rest.

Mr. Creel: Your Honor, at this time I would like to renew the application for the renewal of the bond.

The Commissioner: Well, he said he is going to surrender him.

Mr. Siegel: Yes.

Mr. Creel: Surrender him in the custody of the marshal?

Mr. Siegel: Yes, surrender him in the custody of the marshal pending your Honor's decision here.

The Commissioner: Yes.

Mr. Creel: Is your Honor prepared to make a decision at this time?

The Commissioner: No. I am going to give Mr. Siegel a chance to put in any memorandum of law that he wants.

Mr. Creel: Will your Honor give me a period of time in which to submit one?

The Commissioner: Yes.

Mr. Siegel: I thought we would fix a limitation on both times.

The Commissioner: Yes, we will do that. I want to be fair with both sides.

Mr. Siegel: How long do you want to take? Suppose we take until Friday morning, that is three and one-half days.

The Commissioner: That is satisfactory to me.

Mr. Siegel: And then suppose you take until Monday night.

Mr. Creel: Yes.

The Commissioner: That is all right.

[fol. 164] DEPOSITIONS

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

[Same Title]

DEPOSITIONS OF WITNESSES

sworn and examined on the 26th day of October, 1933, at the office of Edward S. Griffith, Esq., United States Commissioner, Atlanta, Georgia, under and by virtue of a commission issued out of the District Court of the United States for the Southern District of New York in a certain cause therein pending and at issue, wherein United States of America is plaintiff, and Arthur Kassin is defendant.

Appearances as follows:

David P. Siegel, Esq., by Samuel D. Spector, Esq., and Irving D. Laudeutcher, Esq., counsel for defendant.

E. S. Chastain, Esq., Assistant United States Attorney for the Northern District of Georgia, representing the United States Attorney for the Southern District of Florida.

The first of said witnesses, DAVID N. CHADWICK, having been by the Commissioner first duly sworn to tell the truth, the whole truth, and nothing but the truth, as touching the matters about which he should testify, was interrogated by [fol. 165] counsel, and gave testimony as follows:

Direct examination.

Questions by Samuel D. Spector, Esq.:

Q. 1. Mr. Chadwick, you are at the present time incarcerated in the United States Penitentiary at Atlanta, Georgia, under sentence for violation of Section 592, United States Code, being violation of the National Banking Act? Is that correct?

A. Yes.

Q. 2. The crime, for which you are now an inmate of the Atlanta Penitentiary, consists of a certain conspiracy against the Florida National Bank, and certain forgeries against the Bank?

A. I so understand.

Q. 3. And those peculations from the said Bank by reason of the conspiracy of forgeries amounted to $131,425? Is that correct?

A. I understand so, sir.

Q. 4. Are you familiar with all the persons named in the conspiracy indictment?

A. The major portion of them, I am.

Q. 5. I show you this photograph, and ask you whether or not you know the individual whose picture appears thereon?

A. I do not.

Mr. Spector: I offer the photograph in evidence.

Mr. Chastain: Might I ask whose photograph it is?

Mr. Spector: It is the photograph of Arthur Kassin, the defendant in this case.

Mr. Chastain: I have no objection to it.

[fol. 166] Note: The photograph just above referred to was then received in evidence, identified by the Commissioner as Defendant's Exhibit No. 1, and it is hereto appended as part of these depositions.

Q. 6. Do you know whether the individual, whose photograph has been identified as Defendant's Exhibit No. 1, known as Arthur Kassin, was in anywise connected with this conspiracy to defraud the Florida National Bank?

A. I do not, sir.

Q. 7. Was he in fact?

A. To my knowledge he is not.

Q. 8. Are you acquainted with all the individuals that actually participated in this conspiracy and perpetrated these forgeries against the bank?

A. No. I am not acquainted with all of them. I know some of them, the major portion of them.

Q. 9. Do you know the names of all the persons who participated in this crime, without knowing them personally? A. Well, I know those that are incarcerated, and some have not been caught as yet, I understand.

Q. 10. Would you be in position to know or hear of the names of all the persons who participated in this crime?

A. Put it in another way, if you can. So far as Kassin is concerned, I don't know the man.

Q. 11. Do you know whether or not he participated in this crime?

A. To my knowledge, no, sir.

Q. 12. Do you know the names of all the persons who participated in this crime?

A. I know one or two of them. If there are any others, that I don't know, sir, I don't know of them.

Q. 13. Do you know the names of one or two that had anything to do with this crime?

A. Yes.

[fol. 167] Q. 14. Do you know of a man named Livingston to your knowledge?

A. To my knowledge, no, sir.

Q. 15. He had nothing to do with it?

A. To my knowledge, no, sir.

Q. 16. Was he ever in the State of Florida?

A. Not to my knowledge, sir.

Q. 17. Did you ever see him in the State of Florida?

A. To my knowledge, no, sir.

Q. 18. In other words, as far as you know, this man, Arthur Kassin, had nothing whatsoever to do with this series of forgeries against the Florida National Bank?

A. As far as I know, no, sir.

Q. 19. He was never in Florida, so far as you know?

A. So far as I know, no, sir.

Q. 20. He had nothing to do with planning this series of forgeries, as far as you know?

A. So far as I know.

Cross-examination.

Questions by E. S. Chastain, Esq.:

X Q. 1. Mr. Chadwick, do you state that you never saw the man represented by Defendant's Exhibit No. 1?

A. I don't know the man, sir.

X Q. 2. My question is, do you state that you never saw the man represented by the photograph, which is identified as Defendant's Exhibit No. 1?

A. To the best of my recollection I have never seen the man, sir.

X Q. 3. You have never seen the man?

A. To the best of my recollection.

X Q. 4. Do you know a man under the name of Arthur Stern?

A. I know a man by the name of Arthur Stern. I know of a man by the name of Arthur Stern.

[fol. 168] X Q. 5. Where did you know him?

A. In Florida, sir.

X Q. 6. About when?

A. Some time, I think, around about March or February, sir.

X Q. 7. Of 1932?

A. I think so, sir.

X Q. 8. Did you not meet Arthur Stern at the George Washington Hotel in Jacksonville on April 2nd, 1932?

Mr. Spector: I would like to object to this question unless this person, Arthur Stern, is identified in some way with this proceeding. This man, Arthur Stern, is identified in no way with this proceeding and with this indictment. I don't see Arthur Stern listed here.

The Commissioner: Let him answer the questions. I don't know what he is going to answer. We will see what he says.

A. I don't recollect, sir.

X Q. 9. Would you say that you did not meet him; that is, at the George Washington Hotel in Jacksonville on April 2nd, 1932?

A. No; I cannot say, sir. I don't recollect, sir.

X Q. 10. Had you not known Arthur Stern for some considerable period of time prior to that time in Virginia or elsewhere?

A. I knew an Arthur Stern; yes, sir.

X Q. 11. He was the same man that you say in Jacksonville, was he not, about April 1st, 1932?

A. I cannot remember the dates. I do not recollect, sir.

X Q. 12. I say he was the same man you refer to?

A. I don't recall that, sir.

X Q. 13. Do you state positively?

A. I say this to you, sir, that I don't recall it.

X Q. 14. Did not the man known to you as Arthur Stern at the George Washington Hotel in Jacksonville, Florida, [fol. 169] on the night of April 2nd, 1932, take you to room 900 in that hotel, and introduce you to a man whom you know now as Leo Carr?

A. I don't recall, sir.

X Q. 15. Would you state that it did not happen?

A. I will state this to you, that I don't recall it, sir.

X Q. 16. Will you state that it did not happen?

A. I will not, sir, because I don't recall.

X Q. 17. You have no recollection of the transaction at all?

A. I tell you again, sir, I don't recollect, sir.

X Q. 18. I am asking you, have you any recollection of a transaction like that?

A. Yes, sir. I was introduced to a party in the George Washington Hotel, sir. Whether Arthur Stern or Jim Jones or John Smith introduced me, I don't recall.

X Q. 19. Arthur Stern was there?

A. I don't say he was.

X Q. 20. Would you say he was not?

A. I would not say.

X Q. 21. Leo Carr was introduced to you as a professor, was he not?

Mr. Spector: I object to that. Leo Carr is not the object of this deposition.

The Commissioner: I understand this was a conspiracy, and, it being a conspiracy, I think the conduct of all the conspirators can be connected up.

Mr. Spector: As far as Arthur Kassin goes. This is a deposition for the purpose of proving that Arthur Kassin was not in the State of Florida, and had nothing whatsoever to do with this crime. Whether Leo Carr was introduced as a professor or anybody else has nothing to do with it. His [fol. 170] case has been disposed of by his plea of guilty. I think the cross-examination ought to be confined to cross-examination as to Arthur Kassin.

The Commissioner: I could not shut off the evidence with regard to the matter because in this investigation, as I understand it, he is being held for the Florida courts. Now, if the District Attorney in this investigation can show that Carr, this man, or anybody else was connected with anybody that might be Kassin, I think it would be admissible, and ought to be admitted by the Commissioner. Really, I don't think I have got any authority to rule on it, anyhow. Let it go in, and then determine up there whether it is relevant or admissible. That is my idea about the deposition.

X Q. 22. Leo Carr was introduced to you as a professor, was he not?

A. I think so; yes, sir.

X Q. 23. At the George Washington Hotel?

A. I believe that is true.

X Q. 24. About the 2nd of April, 1932?

A. Along or about that time, sir.

X Q. 25. There were present at that time in room 900 yourself, Leo Carr, who was introduced to you as a professor, and Jerome Goldberg, and Arthur Kassin, who was under the name of Arthur Stern?

A. There were three men at that meeting—myself, Leo Carr and one other man; that's all. Regardless of whatever may be said, that's all there was. That man's picture there was not the man that introduced me. I think that answers the whole question. I never saw that man in my life.

Mr. Spector: That is the picture identified as Defendant's Exhibit No. 1?

The Witness: Absolutely.

[fol. 171] Mr. Spector: You never saw the man represented by this photograph, identified here as Defendant's Exhibit No. 1, in your life?

The Witness: Never saw him in my life, that picture there.

X Q. 26. You do not know all of the persons that had to do with the manipulations in connection with the $131,000 and some odd dollars from this bank?

A. I admit that. That is quite true, sir.

X Q. 27. As far as you know, then, the man represented by this photograph, if this is a photograph of Kassin, might have been connected with it?

A. I never saw that man before in my life, sir. It could have been anybody in the United States. I don't know who it was. There are 110 million people in the United States.

X Q. 28. Any one of that 110 million people could have been connected with this conspiracy without your knowledge?

A. Yes, sir.

X Q. 29. Now who were the persons that you told Brother Spector that you knew were connected with the conspiracy?

A. Well, there was myself, my brother——

X Q. 30. Give the names please.

A. My brother here, Julius L. Chadwick, myself and Leo Carr. That's all I know of my knowledge. Since that

time a fellow by the name of Dixon has been placed in the penitentiary here, and another man that goes under the name of Richard Gilbert—he is in the penitentiary in the State of Florida. Those are the only five I know.

X Q. 31. This man supposed to be Jerome Goldberg; you didn't know him, Mr. Chadwick?

A. Is that relevant?

X Q. 32. I think so, if the Court please.

A. Well, I will say this: I knew a Jerome Goldberg.

[fol. 172] X Q. 33. In Jacksonville, Florida, about April 2nd, 1932?

A. That is quite true. I knew a man by that name. How many other names he might have had I don't know.

X Q. 34. I see. You do not know with whom he was connected or operated in Jacksonville, do you?

A. No, sir.

X Q. 35. As far as you know, Mr. Chadwick, he and Kassin, Arthur Kassin, or Arthur Stern, might have been associated with other members of the conspiracy?

A. That is possible. I would not argue that one way or the other. I don't know of my own knowledge.

X Q. 36. You didn't participate in all the activities in connection with it? Your activities in connection with it were more or less limited, your knowledge more or less limited as to what took place?

A. I rather thought so at one time, but the Government didn't think so.

X Q. 37. You saw the man known to you as Arthur Stern about the middle of April or possibly the 1st of May of 1932 at Jacksonville Beach, didn't you, Mr. Chadwick?

A. May I say this to you, sir?

X Q. 38. Just answer my questions.

A. I did not.

X Q. 39. Make any explanation you want to about it.

A. That's a plenty. I didn't see him, sir.

X Q. 40. Where else did you see him besides Jacksonville about that time, Mr. Chadwick?

A. As I told you before, I believe my evidence shows that I did not recollect any particular time I saw the man.

X Q. 41. I will ask you about how many times you saw him?

A. I think I saw him once.

[fol. 173] X Q. 42. What is your recollection as to that location, now, after thinking over it?

A. Well, it was in Florida.

X Q. 43. Where according to your best recollection?

A. Jacksonville.

X Q. 44. At what hotel or place of business?

A. I don't recall, sir.

X Q. 45. You do not recall any place that you saw him in Jacksonville at that time?

A. I do not, sir.

X Q. 46. State whether or not you were ever in a room in any hotel in Jacksonville about the 1st of April, 1932, that was kept by Arthur Stern or the man you knew as Arthur Stern?

A. I don't recall that, sir.

X Q. 47. State whether you ever saw the man known to you as Arthur Stern in St. Augustine, Florida.

A. Not in my life. I can answer that question that I did not, sir.

X Q. 48. How long had it been before you saw Arthur Stern in Jacksonville about April 1st or 2nd, 1932, since you had seen him elsewhere? How long had it been?

A. I don't remember.

X Q. 49. What is your best recollection about that?

A. I have not any, sir.

X Q. 50. None at all?

A. No, sir.

X Q. 51. You have no recollection of how long it had been since you had seen him in Virginia?

A. No, sir; I have not.

X Q. 52. Was it as much as two months?

A. It could have been two months; it could have been four; it could have been six.

X Q. 53. Could it have been two weeks?

A. I don't think so, sir.

X Q. 54. Had you seen Arthur Stern in Wilmington, North Carolina?

A. Absolutely not.

[fol. 174] X Q. 55. Whom did you introduce to Arthur Stern in Jacksonville?

A. Not a single, solitary soul. There was only one person out of that whole trio, quartette, or quintette, that I ever introduced to anyone. I introduced Carr to my brother. That is the only one I have introduced to anybody.

X Q. 56. That took place where?

A. In Jacksonville.

X Q. 57. In what place?

A. In my room. I was stopping at the Breckenridge—no, the Burbridge—Hotel.

X Q. 58. About the 2nd of April?

A. On or about the 2nd, 3rd, 4th or 5th of April, 1932.

Redirect examination.

Questions by Samuel D. Spector, Esq.:

R. D. Q. 1. Now, Mr. Chadwick, you have heard a lot about an Arthur Stern. The Arthur Stern referred to by the United States District Attorney—is it this gentleman (referring to Defendant's Exhibit No. 1)?

A. He is absolutely not.

R. D. Q. 2. Defendant's Exhibit No. 1, the Kassin photograph, is not the Arthur Stern that has been referred to around here?

A. That man I never saw.

Recross-examination.

Questions by E. S. Chastain, Esq.:

R. X Q. 1. You have no knowledge, have you, Mr. Chadwick, of whether this is a photograph of Kassin or not?

A. I never saw that man in my life.

R. X Q. 2. I say you have no knowledge of whether that is a photograph of Kassin?

[fol. 175] Mr. Spector: I concede that, if you want to know that.

Mr. Chastain: But you do state in your place that it is a photograph of Kassin?

Mr. Spector: Yes; that's the man.

Mr. Chastain: That is all, Mr. Chadwick.

Mr. Spector: Nothing further.

And further this deponent saith not.

Subscribed and sworn to before me the 26th day of October, 1933.

The second of said witnesses, JULIUS L. CHADWICK, having been by the Commissioner first duly sworn to tell the

truth, the whole truth, and nothing but the truth, as touching the matters about which he should testify, was interrogated by counsel and gave testimony as follows:

Direct examination.

Questions by Samuel D. Spector, Esq.:

Q. 1. This is Mr. Julius L. Chadwick?

A. Yes, sir.

Q. 2. Mr. Chadwick, you are at the present time incarcerated in the United States Penitentiary at Atlanta, Georgia, under a sentence for violation of Section 592 of the United States Code, violation of the National Banking Act, in that you conspired to defraud the Florida National Bank by a series of forgeries in the sum of $131,425? Is that correct?

A. It was a hundred and thirty-one thousand and some odd dollars.

[fol. 176] Q. 3. Are you familiar with all of the persons named in the conspiracy indictment?

A. No, sir; I am not, sir.

Q. 4. Did you know any of them?

A. I knew Leo Carr and my brother.

Q. 5. That's all you know?

A. Yes.

Q. 6. I show you this photograph and ask you whether or not you know this person (submitting to the witness Defendant's Exhibit No. 1)?

A. No, sir; I do not, sir.

Q. 7. Do you know whether or not this person identified as Kassin had anything to do with this series of transactions?

A. No, sir; I do not, sir.

Q. 8. You don't know? You don't know him?

A. No, sir.

Cross-examination.

Questions by E. S. Chastain, Esq.:

X Q. 1. Mr. Chadwick, you didn't know any of the conspirators that participated except Carr, you stated?

A. Leo Carr; yes, sir.

X Q. 2. And your brother, David N. Chadwick?

A. Yes, sir.

X Q. 3. You do not know with how many people Leo Carr co-operated in the matter, do you?

A. No, sir; I don't.

X Q. 4. He might have co-operated with the man represented by this photograph, Defendant's Exhibit No. 1, as far as you know?

A. Yes, sir.

Mr. Chastain: That is all.

Mr. Spector: That is all for this witness.

And further this deponent saith not.

Subscribed and sworn to before me the 26th day of October, 1933.

[fol. 177] The third of said witnesses, LEO CARR, having been by the Commissioner first duly sworn to tell the truth, the whole truth, and nothing but the truth, as touching the matters about which he should testify, was interrogated by counsel and gave testimony as follows:

Direct examination.

Questions by Irving D. Laudeutcher, Esq.:

Q. 1. Mr. Carr, you are at the present time incarcerated in the Federal Penitentiary by virtue of a sentence imposed upon you for participation in a crime, which was a violation of Section 592 of the United States Code, in violation of the National Banking Act, to which you pleaded guilty?

A. I did.

Q. 2. In that particular crime, to which you pleaded guilty, there were a number of people who participated besides yourselves?

A. Yes.

Q. 3. Were you in a position in regard to the operations and conspiracies pertaining to that crime to know all of the people who participated in that crime?

A. I was.

Q. 4. Among the people who you know participated in that crime was there a man by the name of Arthur Kassin?

A. Not to my knowledge.

Q. 5. I show you a photograph, which is Defendant's Exhibit No. 1, and I ask you whether you know the man who is on this photograph?

A. I do not.

Q. 6. Did you hear of or see a man by the name of Arthur Kassin anywhere in or about any of the localities where any portion of this crime was either perpetrated or carried out?

A. I did not.

[fol. 178] Q. 7. Do you know whether Arthur Kassin was in anywise connected with any of the arrangements that were made between the various individuals who were concerned in the appropriation of the money here in question?

A. You mentioned Arthur Kassin. You mean this man here (whose photograph is Defendant's Exhibit No. 1)?

Q. 8. Yes. A. No.

Cross-examination.

Question by E. S. Chastain, Esq.:

X Q. 1. Mr. Carr, you have stated that you know all of the people who participated in these transactions?

A. Yes.

X Q. 2. Please give the stenographer the names, the correct names of them, now, and the aliases of the individuals who participated in that conspiracy and transaction.

A. I don't feel that I should answer that question because I believe there are other indictments pending against me and it would tend to incriminate me.

X Q. 3. As far as you know, Arthur Stern, a man known in Florida as Arthur Stern, might have participated in that; might he not?

A. Well, I don't recognize the name. If you show me a picture or something——

X Q. 4. I mean a man name Arthur Stern.

A. I don't know of any Arthur Stern.

X Q. 5. You never heard of Arthur Stern?

A. No.

X Q. 6. How about Arthur Stark?

A. You are asking me questions in reference to the crime, are you not?

X Q. 7. Was this man connected with this offense?

A. I never heard of it.

[fol. 179] X Q. 8. You never heard of the name of Arthur Stark connected in any way with these transactions in Florida at any time?

A. No.

X Q. 9. You know Dave Chadwick?

A. I know men by the name of Dave Chadwick. If you show me his picture I will identify him.

X Q. 10. Do you mean to tell this Commissioner here that you don't know Dave Chadwick?

A. I know two Dave Chadwicks.

X Q. 11. Which two do you know?

A. I know a Dave Chadwick that was a co-defendant with me.

Mr. Laudeutcher: May I at this point suggest that the witness be apprised of the fact that, in view of the other indictments pending against him, if he states that he knows these men, which perhaps he does know or perhaps does not know, he may be incriminating himself, so far as the other indictments are concerned? If these questions are being asked as relating to the crime for which he has been indicted, we may have somewhat smoother sailing.

The Commissioner: I don't think, so far as I am concerned, or the Commissioner is concerned, that I have authority to exclude any of it, and I think it would be a question for him to determine whether he does or does not answer the questions. If I had authority to rule on it, I would rule that, as he has put himself up to testify, he will tell the whole story.

Mr. Chastain: He made no objection at the time he was put up as a witness, and I do not think that the witness has a right to testify in part in answer to certain questions, and his testimony be accepted in court, and then decline on cross-examination to answer questions by reason of the fact that he claims it might incriminate him. I wish to know whether [fol. 180] or not the witness now desires to claim the privilege of not testifying in the case at all by reason of the fact that it might incriminate him.

The Witness: I don't quite fully understand you. If you will repeat it, or repeat it in part, I can answer.

X Q. 12. I desire to know whether you now wish to claim the privilege of not testifying at all in the case for the reason that your answers to questions might incriminate you in some way.

A. I wish to testify, all right.

Mr. Chastain: If the Court please, if he is still willing to testify, I insist that he should answer my questions on cross-examination.

The Commissioner: I think he ought to answer the questions on cross-examination, especially about these matters that he has testified about on direct examination. I don't think he can go ahead and testify for the defendant in the case and then, when he is crossed about those same things, decline to testify.

Mr. Laudeutcher: I expect him to testify as to what knowledge he had concerning participation in the crime to which he pleaded guilty. Now, if there are any other indictments, any matters pertaining to indictments other than the one to which he pleaded guilty, I don't think it is within the scope of this particular man's testimony.

Witness (continuing): There is no doubt that there are other indictments pending against me. With my meagre knowledge of law, and meagre knowledge of what I can do to protect myself, I am using my own judgment on it. I am not objecting to answering the questions. I really want to answer them, but I think I have the right to protect myself.

[fol. 181] The Commissioner: You have the right to protect yourself by not answering any questions at all. I don't know any reason why you cannot answer what you are asked. I think if a man goes on the stand as a witness, and testifies partly, he ought to go ahead and tell the whole story. That would be my ruling, if I had authority to rule, but I don't think I have any authority to rule out anything.

Witness (continuing): I have not made any effort to answer any question particularly except who were other participants in the crime. If I answer you, that can be offered as evidence in other indictments pending against me.

X Q. 13. Where did you meet Dave Chadwick, the co-defendant, whom you stated you knew here?

A. I met him in New York.

X Q. 14. When?

A. It would be hard for me to place the exact date. If you could refresh my memory, perhaps I could answer more definitely.

X Q. 15. I will ask you this question, then. Did not two men, one of whom was Dave Chadwick, come to your room, No 900, in the George Washington Hotel in Jacksonville, Florida, on the night of April 2nd, 1932?

A. Now you are asking me a very definite question and I fully realize I am under oath. That man—I cannot recol-

lect whether they came, those two men, or not. I registered at the George Washington Hotel every year probably for years. Is it a fact that I was registered there?

X Q. 16. I understand that it was, Mr. Carr.

A. I registered there every year, and every year I registered there I always had a number of visitors. Last year is taking me back some time. I am not so sure of the dates so much.

X Q. 17. I will ask you if Dave Chadwick, the man who was in here, a co-defendant with you, was not introduced [fol. 182] to you or you introduced to him at the George Washington Hotel about April 1st, 1932, you being referred to as a professor?

A. I don't think that is hardly possible. I just testified that I met Dave Chadwick in New York.

X Q. 18. I am asking you if this other didn't take place.

A. It did not, not that I can recollect.

X Q. 19. Would you say it didn't happen?

A. I would not say either way. You are taking me back to 1932, and I cannot remember after all I have had to think about. I had rather a hectic career in 1932.

X Q. 20. I would like to get from you when you did meet Dave Chadwick first.

A. Well, I cannot exactly place any date in the year 1932. I could not very definitely say unless there was something you could suggest or something. I hesitate to commit myself for the reason that I want to be truthful about it.

X Q. 21. Anyway, you again saw Dave Chadwick in Jacksonville about the 1st of April, 1932?

A. What date was the crime dated, that is, this particular crime? I don't know what date it is.

X Q. 22. I don't know what date is set out in the indictment. My information is the alleged negotiations started about the 1st of April, 1932, and continued for a period up until the 13th of May.

A. You are taking me over the crime again, and then I will have to refuse to answer your questions. I thought I was here for the sole purpose of expressing myself as to whether I have knowledge of all the participants in the particular crime, and I answer I have. As to whether this man on this picture was one of the men, I answered no. That is the only information I can give you right now because, if you are [fol. 183] going to delve into the crime, I will have to refuse to answer certain questions which might incriminate me.

X Q. 23. Where did you get your understanding you just stated?

A. I think I went through these proceedings once before, and I am asking the Commissioner. I was asking the Commissioner.

X Q. 24. I am asking you where you got your understanding about that?

A. I answer that I was here once before on the same thing. I asked what was it all about, and that was the answer.

X Q. 25. You possibly got your information from the Commissioner, when you were back here in June?

A. I think June.

X Q. 26. Did you not know a man named Arthur Stern in Jacksonville at that time?

A. I did not.

X Q. 27. Did you not know a man at St. Augustine, Florida, the latter part of April, 1932, who went under the name of Stark, Arthur Stark?

A. I did not.

X Q. 28. Did you not know a man as Arthur Stark, who was registered at the Cassa Marino Hotel at Jacksonville Beach in April, 1932?

A. No.

X Q. 29. You do not know all the persons, that the conspirators you stated you do know, co-operated with in connection with the business, do you?

A. Yes. I know every conspirator that was ever connected with it.

X Q. 30. You do? You know all of the persons that they were connected with, and co-operated with?

A. I do.

X Q. 31. Were you with each and every one of the conspirators all the time from April 2nd, 1930, to May 13th, 1932?

A. You mean constantly in their company?

[fol. 184] X Q. 32. Constantly in the company of each and every one of them?

A. No.

X Q. 33. You cannot then know with whom they communicated or co-operated, can you?

A. I would know if they did.

X Q. 34. I say you couldn't possibly know, could you?

A. There would be no reason to hide it from me.

X Q. 35. You don't know where they went or what they did out of your presence?

A. No; I cannot say that.

X Q. 36. Nor whom they met?

A. No. I don't know that.

X Q. 37. Well, you cannot then possibly know with whom they communicated or co-operated?

A. In reference to the crime I would have to know.

X Q. 38. They couldn't have done anything in connection with that transaction without your knowing it?

A. Absolutely not.

X Q. 39. Nobody could be interested in it without your knowledge?

A. Absolutely not.

X Q. 40. Do you decline for the reason that it might incriminate you to state who they were?

A. Oh, yes.

Redirect examination.

Questions by Irving D. Laudeutcher:

R. D. Q. 1. Mr. Carr, will you state whether amongst these people, whose names you do not wish to reveal at the present time, there was a man by the name of Arthur Kassin?

A. I answered that before. There was not. I never heard of him.

R. D. Q. 2. And also amongst the men, whose names you refuse to reveal, was there a man, of whom this is a picture [fol. 185] (showing the witness Defendant's Exhibit No. 1)?

A. I don't know of any such man.

Mr. Laudeutcher: That is all.

Mr. Chastain: No further questions.

And further this deponent saith not.

Subscribed and sworn to before me the 26th day of October, 1933.

In the District Court of the United States for the Southern District of New York

[Same Title]

Depositions of witnesses produced, sworn and examined on the 20th day of June, in the year of one thousand nine

hundred and thirty-three, at the office of Edward S. Griffith, United State Commissioner, at Atlanta, Georgia, under and by virtue of a Commission issued out of the District Court of the United States for the Southern District of New York, in a certain cause therein depending and at issue, wherein the United States of America is plaintiff and Arthur Kassin is defendant, as follows:

There were present at said hearing E. S. Chastain, Esq., Assistant District Attorney for the Northern District of Georgia, representing the United States, and Samuel P. Spector, of counsel for the defendant.

[fol. 186] The testimony was taken down in shorthand and reduced to writing by John Gilmore, Shorthand Reporter.

JOHN DICKSON, now an inmate of the United States Penitentiary at Atlanta, Georgia, aged thirty years and upwards, being duly and publicly sworn, pursuant to the directions hereto-annexed, and examined on the part of the defendant, doth depose and say as follows:

Direct examination.

By Mr. Spector:

Q. Mr. Dickson, you are at the present time incarcerated in the United States Penitentiary at Atlanta, Georgia?

A. That is correct.

Q. Under sentence for violation of Section 592 of the United States Code, and violation of the National Banking Acts?

A. That is right.

Q. Are you familiar with all the persons named in the conspiracy indictment?

A. I don't know; name them.

Q. Do you know Leo Greenback, alias Leo Carr?

A. Yes.

Q. Do you know Jerome Goldberg?

A. Yes.

Q. Do you know Joseph Kramer?

A. Yes.

Q. Do you know Jerelian Selmon, alias Jack Semon?

A. No.

Q. Do you know Archie Kassin, alias Arthur Kassin?

A. No.

Q. Do you know Morris Gunter, alias Joe Goldman?
A. No.
Q. Do you know Julius Chadwick?
A. Yes.
[fol. 187] Q. Are you familiar with all of the acts conducted against the Florida National Bank?
A. Yes.
Q. And with the forging of certain documents on account of the Almours Security Company, a corporation?
A. Yes.
Q. Are you acquainted with all of the gentlemen involved in the commission of this series of crimes?
A. No, I don't know them all.
Q. Do you know all of the persons who participated in the crimes?
A. No.
Q. I show you this photograph, which I will get the stenographer to identify as Defendant's Exhibit A, and ask you whether or not you know this particular person?
A. No, I do not.

Mr. Spector: I now offer this photograph in evidence.
Mr. Chastain: Do you know whose photograph it is?
Mr. Spector: The photograph offered in evidence is the photograph of Arthur Kassin.

Q. Did this particular individual, Defendant's Exhibit "A," offered in evidence, have anything to do with the acts of forgery, the committing of the forgery of these various instruments of the Almours Security Corporation?
A. Not to my knowledge, no.
Q. Was he in anywise connected with the arrangements made between these various individuals concerning the appropriation of this money?
A. No.
Q. Was he in anywise directly or indirectly connected or involved in the appropriations of the sum of $131,425 from the Florida National Bank?
A. No.

[fol. 188] Cross-examination.

By Mr. Chastain:

Q. Mr. Dickson, you stated you were familiar with these operations; just state what your connection with them was?

A. Passing the checks—presenting them for payment.

Q. How many checks were there?

A. Approximately twenty-two, I think.

Q. Did they account for the whole total referred to of $131,000?

A. No, they did make up the whole total; that is what I am charged with.

Q. How many checks did you handle?

A. Approximately twenty-two.

Q. Was that all?

A. That was all.

Q. What was the total of your approximately twenty-two checks?

A. $58,000, approximately.

Q. To whom or to what bank were those approximately twenty-two checks presented by you?

A. The Atlantic National Bank at Jacksonville, Florida.

Q. All of them?

A. Yes.

Q. From whom did you receive those approximately twenty-two checks?

A. From Leo Carr.

Q. All at one time or at various times?

A. At various times.

Q. Where did you receive the first check from Carr?

A. I don't remember.

Q. What is your best recollection about it?

A. In the City of Jacksonville.

Q. Who was with Carr?

A. He was alone.

Q. No one with him?

A. No one.

Q. Where was Carr stopping?

A. At the George Washington Hotel, I think.

Q. About what was the date of the receipt of this first check?

A. The first part of April, 1932.

[fol. 189] Q. Over what period of time were those checks received by you?

A. Over a period of six weeks following the first of April.

Q. Where were all of the others received?

A. At various places.

Q. In what city?

A. In Jacksonville.

Q. Who was present at any time when you received any of those checks?
A. No one.
Q. Where were you stopping at that time?
A. I was stopping at the Mayflower Hotel, Jacksonville.
Q. What day did you register there?
A. March 16th.
Q. Did you then check out and register again?
A. No, not there; I registered at the Seminole on the 16th of March.
Q. How long did you remain at the Seminole?
A. Two weeks.
Q. And then where?
A. At the Mayflower.
Q. What day did you register at the Mayflower?
A. The first of April.
Q. Under what name?
A. George Burke.
Q. What room did you occupy?
A. I don't recollect.
Q. You remained at the hotel for what length of time?
A. Approximately two weeks.
Q. Then where did you register?
A. At the Casamaroon Hotel at Atlantic Beach.
Q. Is that also known as the Atlantic Beach?
A. No, it is a separate and distinct hotel.
Q. Under what name were you registered there?
A. George Lee.
Q. How long did you remain at the Casamaroon?
A. One month.
Q. Who was at the Casamaroon Hotel with you?
A. Joe Duffin.
[fol. 190] Q. What was his real name?
A. I don't know.
Q. Did you know him by any other name?
A. Joe Kramer.
Q. What other name beside that?
A. Richard Goldman.
Q. What part did he have?
A. Identically the same part as I had.
Q. By that you mean he presented some of the checks?
A. Yes.
Q. Separate from yourself?
A. Yes; separate.

Q. During the same period of time you were presenting your checks?

A. Yes.

Q. At what bank?

A. The Barnett National Bank.

Q. How many checks did he present?

A. I don't know.

Q. Approximately what amount of money?

A. I can't answer, I don't know.

Q. Do you know Jack Semon?

A. No, sir.

Q. Did you meet a man at the Mayflower Hotel under the name of John Burtone?

A. No, sir.

Q. Did you meet John Burtone at any other place in Jacksonville, or in Florida?

A. No, sir.

Q. Mr. Dickson, I hand you a photograph here numbered 127286, dated 5-27-32, and ask you to state whether or not you didn't see the man of which that is a photograph at the Casamaroon Hotel?

A. No, sir.

Q. You never did?

A. No, sir.

Q. As representing a man whom you saw at the Casamariana Hotel, at Atlantic Beach?

A. No, sir.

Q. You know Jerome Senbrick, do you not?

A. Yes.

Q. Where did you meet him?

A. At Jacksonville.

Q. About when did you first meet him?

A. I met him in New York prior to that.

[fol. 191] Q. State whether or not Senbrick and Carr were associated at the time of the handling of these checks?

A. I don't know.

Q. You never saw them together during that period?

A. No, sir.

Q. At any place?

A. No, sir.

Q. In a hotel, or in a cottage on the beach, or at any time?

A. No, sir.

Q. Did you during that period of time either live with Carr or Senbrick, either in Jacksonville or at Jacksonville Beach?

A. No, sir.

Q. Or Atlantic Beach?

A. No, sir.

Q. Or St. Augustine?

A. No, sir.

Q. Where were you on the day that Richard Goldman was arrested?

A. Across the street.

Q. In Jacksonville?

A. Yes.

Q. What did you do that day, Mr. Dickson?

A. I refuse to answer that question, as it has no bearing on the case.

Mr. Spector: I object to that, as it has no bearing on the identification of Arthur Kassin, or the connection of Arthur Kassin with this crime, and the purpose of this commission.

The Commissioner: Let him answer the question.

The Witness: I refuse to answer the question for the reason that it has no bearing on the case.

Mr. Chastain: My purpose in asking that question is to show what knowledge he has of the movements of Kassin on that date.

Mr. Spector: There is no claim that at the date of Richard Goldman that Kassin was in Florida. The Government has maintained that Kassin was in Florida the latter part of April and the beginning of May.

[fol. 192] Mr. Chastain: If your Honor please, I think it is material to show whether Arthur Kassin was there at any time during this period.

Mr. Spector: The witness has testified that he did not know Kassin.

The Commissioner: I hold he should answer the question as to where he was and what he was doing on that day. If it is a privileged communication that he should not tell, the Court on the trial of the case would shield him, of course, but I think he should tell what he knows.

The Witness: The question has no bearing on that case.

The Commissioner: I am holding you should answer the question.

Q. The question is—What did you do that day that Richard Gillman was arrested?

A. I went to a telephone and called a number at Atlantic Beach, but I don't recollect the number, and Carr answered. I first told him what had happened and he told me to come to Jacksonville Beach. I proceeded to Jacksonville Beach and packed my clothes and left for New York. That is all.

Q. Where did you see Carr and Goldberg on that day?

A. I did not see them on that day together.

Q. Where did you see Carr on that day?

A. At some cottage on the Beach, I don't know the name of it.

Q. Who was with him?

A. He was alone.

Q. Where did you see Goldberg that day?

A. I did not see Goldberg that day.

Q. When did you see him after that?

A. I never have seen him since.

Q. Have you seen Kassin since that date?

A. No, sir.

[fol. 193] Mr. Spector: If the Court please, I object to the question and move to strike it out as misleading; there is an implication that he had seen him.

The Witness: I never saw Kassin at all.

Q. Have you seen Semon since May 13, 1932?

A. I never saw Semon before nor since, at any time.

Q. Who did you see in St. Augustine, Florida, on May 13?

A. Leo Carr.

Q. Where was he?

A. On the street.

Q. In St. Augustine?

A. Yes.

Q. What time of day was that?

A. About four o'clock in the afternoon.

Q. Was that before or after Gillman's arrest?

A. After.

Q. Did you travel back and forth between Jacksonville Beach and Jacksonville, Florida, during the period from April 9th to May 13th, 1932?

A. Yes, sir.

Q. You would come into Jacksonville daily?

A. Almost every day.

Q. With whom did you travel?

A. With Gillman.

Q. Did you not visit a man registered at the Mayflower Hotel in Jacksonville in Room 900 under the name of John Burtone?

A. I have already answered that question, no, I don't know the party in question.

Q. During the period of time from April 2nd to May 13th?

A. No.

Q. Did you or not visit Room 900 at the Mayflower Hotel in Jacksonville during the period from April 2nd to May 13th?

A. In whose name was it, I don't know, it may have been mine.

[fol. 194] Q. Assuming your room was 808 at the Mayflower Hotel, did you or not visit Room 900 in the Mayflower Hotel during that period of time?

A. No, sir.

Redirect examination.

By Mr. Spector:

Q. Mr. Dickson, during the course from April 1st, 1932, to May 13th, 1932, you had had occasion to see all of the persons connected with this series of operations?

A. Yes.

Q. You talked with them?

A. Yes.

Q. You knew them all?

A. Yes.

Q. Was this person identified as Defendant's Exhibit "A" in evidence, was he one of the persons with whom you had spoken?

A. No, sir.

Q. You never saw him?

A. No, sir.

Q. As far as you know, he had nothing to do with this case?

A. Absolutely not.

Q. I show you another photograph here. During the course of time that you had dealings with all the members in the operation of this series of crimes, did you at any time have occasion to talk to this man?

A. No, sir.

Q. Was he in any way connected with this series of crimes?

A. No, sir.

Mr. Spector: I tender in evidence photograph identified as Defendant's Exhibit "B," and identified as a photograph of Jack Semon, also known as John Burtone.

Recross-examination.

By Mr. Chastain:

Q. Mr. Dickson, this man Semon, alias Burtone, could have had something to do with these operations without your knowledge, could he not?

A. I doubt it.

[fol. 195] Q. You stated, I believe, that you knew all that had connection with it?

A. Yes, all that were mentioned, except three.

Q. Were you with those that you mentioned as knowing, all that time?

A. No, sir.

Q. You could not possibly know what they did when you were not with them, could you?

A. Certainly not.

Q. You don't know what connection they had with this man Semon in your absence—you had no means of knowing that? These men you said were connected with it?

A. Not of my knowledge.

Q. You don't know what connection these men you say you knew were connected with it had with Kassin during your absence?

A. No.

Q. You could not possibly have known that?

A. If they had any connection, I did not know it.

Q. That is all you can say?

A. I know they did not; I would have been taken into their confidence if they had.

Q. That is a conclusion—you were not with them all the time?

A. No.

Q. You don't know with whom they visited?

A. No.

Q. Or with whom they conversed?

A. No, sir.

Q. Or with whom they traveled during the time you were not with them?

A. Certainly not.

Q. You testified, Mr. Dickson, that this man represented by this photograph here was not at the Mayflower Hotel during the period you were registered there?

Mr. Spector: If the Court please, he did not testify that he was not at the Mayflower Hotel. He testified that he did not know the gentleman. The Mayflower Hotel has 300 rooms.

[fol. 196] A. I will answer, not to my knowledge.

Q. I show you this photograph, marked Defendant's Exhibit "A," and ask you to state whether you testified that that man was not at the Casamarina Hotel during the time you were there.

A. I have said I do not know the man, and never saw him any place. That should cover the question.

Q. Do you state that the man represented by Defendant's Exhibit "A" was not at the Casamarina Hotel during that period of time to your knowledge?

A. I don't know. He could have been there. To my knowledge he was not there. He does not exist to my knowledge.

Q. If he was there, you did not know him?

A. That is right.

By Mr. Spector:

Q. Now, Mr. Dickson, had any one of those two gentlemen or had this defendant Kassin anything to do with the series of crimes, would you have been in a position to know about it?

A. That is right.

Q. You would at least have heard the name or seen the man?

A. Yes, sir.

Q. You were acquainted with all details?

A. Yes, sir.

Q. This man Kassin could not possibly have had anything to do with this series of crimes without your knowing it?

A. No, sir.

By Mr. Chastain:

Q. Why do you say no?

A. I was there at every transaction and he was never present.

Q. Were you present in the bank when Richard Goldman deposited his checks?

A. No, sir.

[fol. 197] Q. You were then not present at all the transactions?

A. That was not a transaction. There was nobody else present. It was always done alone.

Q. Were you present when Carr and Goldberg gave Goldman the checks?

A. Yes.

Q. Then you saw Goldberg?

A. Yes.

Q. They were not then always alone when some transaction was had?

A. No, not always.

Q. To whom did you give the money when you got it on the checks?

A. To Carr.

Q. Did Goldberg ever give you a key to a box when you were in one of the banks in Jacksonville?

A. No, sir.

Q. Did he at any other time?

A. No, sir.

Examination taken, reduced to writing and by the witness subscribed and sworn to this 20th day of June, 1933.

At this point a recess was taken until 3 P. M.

Hearing resumed at 3 P. M.

Leo Carr, now an inmate of the United States Penitentiary at Atlanta, Georgia, aged thirty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the defendant, doth depose and say as follows:

Direct examination.

By Mr. Spector:

Q. Mr. Carr, you are one of the men convicted in Jacksonville, Florida, charged with the crime of violation of the National Banking Laws?

[fol. 198] A. If I understand the question, I would like it to be explained to me very clearly what it is all about.

Mr. Spector: Well, you are here by virtue of an order made by Mr. Justice Bondy, Judge of the United States District Court for the Southern District of New York, upon a commission to be examined on certain matters which are pertinent and necessary in the matter of the United States versus Arthur Kassin, a proceeding brought by the United States Government to remove the said Kassin to the Southern District of Florida.

The Witness: May I ask a question? The only thing I am interested in now is to know whether there are any indictments open against me. Two I have been sentenced in; is there a third indictment that I am a defendant in?

Mr. Spector: Yes, that is true.

The Witness: Then I am eligible for trial under that indictment?

Mr. Spector: Yes.

The Witness: If that is the case, I would say I refuse to testify anything at this time.

The Commissioner: Is there an indictment open against him that has not been tried, and that involves this whole transaction?

Mr. Spector: Yes.

The Commissioner: Then he has a right to refuse to testify.

Mr. Spector: I would not want to infringe upon his constitutional rights.

The Commissioner: In this action, if you ask him any question that he thinks might incriminate him, he has a right to decline to answer it, and he has a right to decline to testify altogether.

[fol. 199] Mr. Spector: I will limit my examination to identifying the picture of Arthur Kassin, and see if he knows him, and I will stop right there.

By Mr. Spector:

Q. Mr. Carr, I show you this photograph and ask you whether or not you know this man?

A. I am not going to answer that question.

The Commissioner: You decline to answer that question?

The Witness: I do.

Mr. Spector: We will waive examination then, but I think there ought to appear in the record this statement of the defendant:

I refuse to answer any and all questions regarding indictment acted upon by the Grand Jury in December, 1932, in the United States District Court for the Southern District of Florida, on the ground that I am a defendant in that indictment, and that any evidence pertaining to this indictment may tend to jeopardize my rights, or to incriminate myself thereon.

The Commissioner: I sustain the right of witness to decline to be examined.

Examination taken, reduced to writing and by the witness subscribed and sworn to this 20th day of June, 1933.

[fol. 200] In United States District Court

Memorandum Opinion of Judge Hulbert

It is contended by the Government and vigorously disputed by defendant's counsel that the issues herein were raised on the same evidence in the recent case of Jeriahem Seeman jointly indicted with Arthur Kassin.

A comparison of the record establishes a substantial distinction.

In the Seeman case, the Court refused to accept and consider depositions secured from certain other defendants jointly indicted. In the instant case, the depositions were not only considered by the Commissioner, but subsequent thereto the Government was permitted to call as a witness Roger Main, an investigator of the Department of Justice, who testified to conflicting statements made by the witnesses before and after the depositions were taken. The

propriety of the reception of the testimony of Main was challenged.

Hence, I have reviewed the evidence in detail.

While I do not believe that the Commissioner is held to the same rigid rule as would be applicable upon the trial of the indictment (Hughes v. Gault, 271 U. S. 142), the evidence in this case satisfies me that the Commissioner would have been amply justified in making the order of removal even had he not admitted, or disregarded, the testimony of the witness Main.

Accordingly, I find that the evidence sufficiently establishes the identity and probable cause of the connection of the defendant Arthur Kassin with the crime charged, without taking into consideration the testimony of the agent Main, and dismiss the Writ of Habeas Corpus and remand the defendant, Arthur Kassin, to the custody of the Marshal to be removed to the Southern District of Florida in accordance with the order of Judge William Bondy dated June 29th, 1934.

Hulbert, D. J.

[fol. 201] Disposition of this matter not having been made until noon on Saturday, stay of execution will be granted to the defendant Kassin until Tuesday, July 17th, 1934, at 2.00 P. M. to procure the allowance of bail on appeal.

Hulbert, D. J.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING WRIT—July 14, 1934

A petition and writ of habeas corpus for the release of the above relator having come on to be heard before this Court on the 3rd day of July, 1934, and the respondent having filed a return to said petition and writ, and a transcript of the record of the removal proceedings held before the Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York, having been certified to this Court,

Now, on reading the aforesaid transcript of the record of the removal proceedings herein, and on examining the [fol. 202] exhibits therein, and after hearing David P. Siegel in support of the writ of habeas corpus and Martin

Conboy, United States Attorney for the Southern District of New York, by J. Randall Creel, Assistant United States Attorney, of counsel, in opposition thereto, it is

Ordered that the said writ of habeas corpus be, and the same hereby is, dismissed, and the relator be, and he hereby is, remanded to the United States Marshall for the Southern District of New York; and it is

Further ordered that the execution of this order and warrant of removal be, and the same hereby is, stayed pending appeal from this order; and it is

Further ordered that the application for bail pending appeal be made not later than Wednesday, July 18, 1934, at 10.30 A. M.

Murray Hulbert, United States District Julge.

[fol. 203] In United States District Court, Southern District of New York

Petition for Appeal

And now comes the relator, Arthur Kassin, by David P. Siegel, Esq., his attorney, and complains that in the record and proceedings had in the hearings held before the Hon. Garrett W. Cotter, United States Commissioner for the Southern District of New York, upon the complaint for removal of the relator to the United States District Court for the Southern District of Florida filed before said Commissioner, and also in the order of committment made by the said Commissioner on or about the 26th day of June, 1934, and in the order dismissing the writ of habeas corpus sued out by the relator herein made and entered herein on the 14th day of July, 1934, certain manifest errors have intervened to the great prejudice and damage of the said relator, who, conceiving himself aggrieved thereby, does hereby appeal to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of errors which are filed herewith.

Wherefore, the said relator, Arthur Kassin, prays for the allowance of the appeal herein and for such other and further orders and processes as may cause all and singular records, papers and proceedings in said cause to be sent to the United States Judges for the Circuit Court of Ap-

peals for the Second Circuit, under and according to the laws of the United States in that behalf made and provided, so that the same may be inspected and said Judges of the [fol. 204] said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law ought to be done and also that an order be made herein that all proceedings in this action be sustained and stayed until the determination of said appeal by the said Circuit Court of Appeals for the Second Circuit, and also that a citation may issue herein as provided by law.

And your petitioner will ever pray.

Dated, New York, July 17th, 1934.

David P. Siegel, Attorney for Relator-Appellant, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 205] In United States District Court

Order Allowing Appeal—July 18, 1934

On reading the petition of Arthur Kassin, the relator herein, for the allowance of an appeal from the order of the United States District Court for the Southern District of New York entered herein on the 14th day of July, 1934, and the assignments of error presented on behalf of said relator herewith, it is hereby

Ordered that an appeal be and the same hereby is allowed to the said Arthur Kassin, the relator herein, from the order of the United States District Court for the Southern District of New York dated the 14th day of July, 1934, to the United States Circuit Court of Appeals for the Second Circuit as prayed for in the petition for an allowance of an appeal, and it is further.

Ordered that a transcript of all and singular records and proceedings in the above entitled case be duly authenticated and transmitted to the said United States Circuit Court of Appeals for the Second Circuit and that a citation be issued as provided by law.

Robert P. Patterson, United States District Judge.

[fol. 206] Citation in usual form omitted in printing.

[fol. 207] In United States District Court, Southern District of New York

Assignments of Error

Now comes the relator and appellant above named by David P. Siegel, his attorney, and in connection with his petition for an appeal and the granting thereof makes and files the following as his assignments of error of the District Court of the United States for the Southern District of New York in the above entitled matter and proceedings:

Assignment of Error No. 1

The Court erred in finding that there was probable cause to believe the relator guilty of any of the offenses alleged in the indictment.

Assignment of Error No. 2

The Court erred in refusing to hold that there was no legal evidence from which to find that there was probable cause to believe the relator guilty of any of the offenses alleged in the indictment.

Assignment of Error No. 3

The Court erred in refusing to hold that the evidence adduced by the relator completely destroyed the presumption of probable cause to find the relator guilty of any of the offenses alleged in the indictment.

Assignment of Error No. 4

That the Court erred in holding that the evidence amply justified the Commissioner in making an order of removal even had he not admitted, or disregarded, the testimony of the witness Main.

[fol. 208] Assignment of Error No. 5

That the Court erred in ruling that the evidence sufficiently established the identity of the relator and the probable cause of his connection with the crimes charged in the indictment filed in the United States District Court for the

Southern District of Florida without taking into consideration the testimony of the witness Agent Main.

Assignment of Error No. 6

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator on the ground that the evidence offered by the relator and on his behalf completely established his innocence of wrongdoing.

Assignment of Error No. 7

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator herein on the ground that the evidence offered by the relator and on his behalf completely established him as innocent of the commission of any of the offenses alleged in the indictment.

Assignment of Error No. 8

The Court erred in failing to sustain the writ of habeas corpus sued out herein and to discharge the relator on the ground that the testimony adduced through Special Agent Roger Main over the objection and exception by counsel for relator was incompetent and prejudicial to the rights of the relator and in violation of the relator's rights under the Constitution of the United States and the amendments thereto.

[fol. 209] Assignment of Error No. 9

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator on the ground that the testimony of Special Agent Roger Main was hearsay and incompetent.

Assignment of Error No. 10

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator on the ground that the testimony adduced through Special Agent Roger Main was improperly received over the objection and exception of counsel for relator for the purpose of impeaching the testimony theretofore given by several of the witnesses for the defendant since no proper foundation had been laid therefor by calling to the attention of the said witnesses

at the time of their interrogation the time, place and circumstances of the making of the alleged inconsistent or contradictory statements.

Assignment of Error No. 11

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator on the ground that Special Agent Roger Main was not a proper rebuttal witness and that the testimony offered by him was not proper rebuttal testimony.

Assignment of Error No. 12

The Court erred in refusing to sustain the writ of habeas corpus and to discharge the relator on the ground that the indictment was improperly received in evidence over the [fol. 210] objection and exception of counsel for the relator on the ground that there was no showing that the indictment or any of the things alleged therein pertained or had reference to the relator in any manner, shape or form.

Whereas, by the law of the land, the said writ of habeas corpus should have been sustained and the said Arthur Kassin, relator-appellant, discharged from custody, the said Arthur Kassin by his attorney, David P. Siegel, Esq., praying that for the aforesaid errors, the decision and order made on the 14th day of July, 1934, may be reversed and for naught held and esteemed and that said writ of habeas corpus be sustained and the relator-appellant discharged from the custody of the respondents-appellees, Raymond J. Mulligan, United States Marshal for the Southern District of New York, and that the said Arthur Kassin be granted such other and further relief as may be proper in the premises.

Dated New York, July 17th, 1934.

David P. Siegel, Attorney for Relator-Appellant, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 211] In United States District Court

Stipulation and Order Waiving Printing of Exhibits

It is hereby stipulated and consented by and between the United States Attorney for the Southern District of New

York and the attorney for the petitioner-appellant, that the printing of the exhibits, other than those printed and digested herein, on the trial of the above entitled cause be and the same hereby is waived and the said exhibits may be presented by either side on the argument of the appeal herein, with like force and effect as though physically reproduced in the record herein.

Dated New York, October 4th, 1934.

Martin Conboy, United States Attorney for the Southern District of New York. David P. Siegel, Attorney for Petitioner-Appellant.

So ordered, this 4th day of October, 1934.

Manton, U. S. C. J.

[fol. 212] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing in one (1) volume is a true and correct transcript of the record of proceedings of the said District Court in the above entitled cause, as agreed upon by the parties, and the whole thereof, and that the same may be used by the Clerk of this Court in lieu of the original papers in certifying a record on appeal herein.

Dated New York, October 4th, 1934.

Martin Conboy, United States Attorney for the Southern District of New York. David P. Siegel, Attorney for Petitioner-Appellant.

So ordered, this 4th day of October, 1934.

Hulbert, U. S. D. J.

[fol. 213] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 214] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA on the Relation of ARTHUR KASSIN, Appellant,

against

RAYMOND J. MULLIGAN, U. S. Marshal, Appellee

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York, dismissing a writ of habeas corpus to review an order removing the relator to another district for trial upon an indictment.

David P. Siegel for the appellant.
J. Randall Creel for the appellee.

Per CURIAM:

This appeal is from an order dismissing a writ of habeas corpus to review an order of removal of the relator from the Southern District of New York to stand trial in the District of Florida upon an indictment for conspiracy to embezzle from the Florida National Bank of Jacksonville, a member of one of the Federal Reserve banks. The identity of the defendant is not disputed, and the only issue is whether there was probable cause. Upon the hearing before a commissioner the prosecution put in evidence the indictment and nothing else except the evidence of identity. The relator replied with his own testimony and that of several other witnesses, designed to show that he was innocent. After some rebuttal by the prosecution the commissioner determined that there was reasonable cause for the prosecution and ordered the removal. We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The first question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause, Tinsley v. Treat, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evi-
[fol. 215] dence which the accused chooses to bring in; and

no doubt his judgment must be his own, based upon all the evidence before him, though the indictment is necessarily hearsay. But we decided, after as careful consideration as we could give it, in U. S. ex rel. Scharlon v. Pulver, 54 Fed. (2) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers; we did not commit ourselves to the sufficiency of a mere ritual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defence, he has not really done so. Such cases will be very rare; this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. U. S. ex rel. Kohl v. Mulligan, 54 Fed. (2) 1085; U. S. ex rel. Pugliese v. Pulver, 61 Fed. (2) 1044; U. S. ex rel. Frank v. Mulligan, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread U. S. ex rel. Hughes v. Gault, 271 U. S. 142. Such appeals are therefore ordinarily fruitless.

The relator raises a second point. On rebuttal the prosecution called witnesses to impeach two of the accused's witnesses by imputing to them statements contradictory to their testimony on the stand. The ground had not been prepared for this evidence by asking the impeached witnesses on cross-examination whether they had not so contradicted themselves. That was indeed a condition and made the testimony in rebuttal incompetent, especially as the prosecution apparently already knew the contradictions at the time of the cross-examination. Wigmore, § 1025. Thus the commissioner considered evidence which strictly he should not have heard. Nevertheless we are not disposed to require him to reconsider his decision. There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in court. U. S. v. Green, 108 F. R. 816, 819, 820; U. S. v. Kallas, 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in U. S. ex rel. Hughes v. Gault, supra (271 U S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal

[fol. 216] justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradiction and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings.

Order affirmed.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. U. S. A. ex rel, Arthur Kassin, against Raymond J. Nulligan, U. S. Marshal. Opinion Per Curiam.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 13th day of November, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES ex rel. ARTHUR KASSIN, Relator-Appellant,

vs.

RAYMOND J. MULLIGAN, as U. S. Marshal, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York:

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 217] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. Arthur Kassin, vs. Raymond J. Mulligan, as U. S. Marshal, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 13, 1934. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 219, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. Arthur Kassin, Relator-Appellant, against Raymond J. Mulligan, as U. S. Marshal, etc., Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of November in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 218] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,197. U. S. Circuit Court of Appeals, Second Circuit. Term No. 569. United States of America, on relation of Arthur Kassin, Petitioner, vs. Hon. Raymond J. Mulligan, United States Marshal for the Southern District of New York, et al. Petition for a writ of certiorari and exhibit thereto. Filed December 10, 1934. File No. 569, O. T., 1934.

(5910-C)

FILE COPY

DEC 10 1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA, on relation of ARTHUR KASSIN,

Petitioner,

against

HON. RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HON. GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID P. SIEGEL,
Counsel for Petitioner.

IRVING DAVIS,
MILTON B. SEASONWEIN,
A. ISADORE EIBEL,
On the Brief.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.

INDEX

	PAGE
PETITION	1
Questions Presented	2
Statement	3
Analysis of Facts	4
Specification of Errors to be Urged	10
Reasons for Granting the Writ	10
BRIEF IN SUPPORT OF PETITION	13
Opinions Below	13
Jurisdiction	13
Questions Presented, Statement, Etc.	14
Argument	14
I—There was no probable cause for believing the petitioner guilty of the offenses charged in the indfetment so as to warrant removal, and it constituted grave error to refuse to review the Commissioner's contrary finding and/or to limit the review merely to the Commissioner's "honesty", and in failing to determine whether there was any evidence sufficient to support the finding of probable cause made by the Commissioner	14
II—Admission of the testimony of Special Agent Main was prejudicial and contrary to law	31
CONCLUSION—The petition for a writ of certiorari should be granted	36

TABLE OF CASES.

	PAGE
Ayers v. Watson, 132 U. S. 394	32
Beavers v. Henkel, 194 U. S. 73	17, 18
Bennett v. Hoffman, 289 Fed. 797	32
Ex Parte Bullard, 58 Fed. (2d) 206	29
Go-Bart Importing Co. v. U. S., 282 U. S. 344	33
Greene v. Henkel, 183 U. S. 249	34
Johnson v. Hotchkiss, 35 Fed. (2d) 914	21
Larkin v. Nassau Electric R. R. Co., 205 N. Y. 267	32
Mattox v. U. S., 156 U. S. 327	32
Meehan v. U. S., 11 Fed. (2d) 847	24
Moore v. Harvey, 236 App. Div. (N. Y.) 815	34
People v. Mallon, 116 App. Div. (N. Y.) 425, affirmed 189 N. Y. 520	32
People ex rel. Perkins v. Moss, 187 N. Y. 110	34
People v. Schenk, 142 N. Y. Supp. 1081	34
Richter, Re, 100 Fed. 205	28
Stacy v. Graham, 14 N. Y. 492	28, 32
Taylor v. U. S., 89 Fed. 954	32
Tinsley v. Treat, 205 U. S. 20	17, 18
United States v. Andrade, 10 Fed. (2d) 572	28
United States v. Beavers, 125 Fed. 778	33
United States v. Glass, 25 Fed. (2d) 941	25
United States v. Green, 136 Fed. 618	25, 34
United States v. Greene, 100 Fed. 941	28, 35
United States v. Johnston, 292 Fed. 491	28
United States v. Kallas, 272 Fed. 742	35
United States v. Keough, 48 Fed. (2d) 246	29
United States v. Morse, 287 Fed. 906	29, 33
United States ex rel. Hughes v. Gault, 271 U. S. 142	29, 30, 31, 35
United States ex rel. Scharlon v. Pulver, 54 Fed. (2d) 261	15, 16
Wood, Re, 95 Fed. 288	26

STATUTES.

United States Code, Title 18, Section 591	33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. .....

UNITED STATES OF AMERICA on the relation of ARTHUR KASSIN,

Petitioner,

against

Hon. RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HON. GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arthur Kassin, the petitioner above-named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming an order made and entered in the United States District Court for the Southern District of New York, dismissing writs of habeas corpus and certiorari in a removal proceeding. The

judgment of the Circuit Court of Appeals was entered on November 5, 1934. Issuance of the mandate of the Circuit Court of Appeals was stayed by Mr. Justice Harlan F. Stone, of this Court, on November 27, 1934.

Questions Presented.

1. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to determine whether there is probable cause to warrant removal and to overrule, if necessary, the finding of the Commissioner on this point.

2. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to review the finding of probable cause made by the Commissioner, and if necessary, to overrule such finding.

3. Whether the power and jurisdiction of the District Court and, upon appeal, of the Circuit Court of Appeals to review the finding of probable cause made by the Commissioner is limited strictly to a determination of the *honesty* of the Commissioner in considering the evidence.

4. Whether there was any evidence from which to find probable cause of the connection of the petitioner with the crimes charged in the indictment so as to warrant his removal.

5. Whether in a removal proceeding a United States Commissioner may proceed without regard to the rules of the common law governing the admissibility of evidence, and whether in such event, the determination of the said Commissioner is valid and binding.

Statement.

Petitioner and others were indicted in the United States District Court for the Southern District of Florida for alleged violations of Section 37, U. S. C. C., and Section 592 of Title 12 of the United States Code. All of the charges in the indictment relate to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of said bank (R. 19-53). Petitioner was apprehended within the Southern District of New York and arraigned before a United States Commissioner in that District on a complaint praying for his removal to the Southern District of Florida (R. 3, 15, 18, 54). Hearings were held before said Commissioner and the depositions of all of the defendants named in the indictment who were then in custody were taken and submitted to the Commissioner (R. 54-199). Removal of petitioner was recommended by the Commissioner and an order to that effect was signed by a District Judge (R. 200). Thereupon petitioner sued out writs of habeas corpus and certiorari, to which the United States Marshal and the Commissioner duly filed returns (R. 2-18). Said writs were dismissed in the District Court, and the order of dismissal was affirmed upon appeal (R. 200-210; 214 *et seq.*).

Analysis of Facts.

Each of the offenses charged in the indictment relate to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of that bank by the payment of forged checks drawn on the account of a depositor of that bank. Petitioner is charged both as a conspirator and as an aider and abettor (R. 19-53). After introducing a certified copy of the indictment (R. 54-55, 76-77), two witnesses were called to identify petitioner as one of the defendants named therein. The first of these witnesses, Augustus O. MacDonnell (R. 56-61, 71-76, 79-84), described himself as the vault custodian of the St. Augustine National Bank of St. Augustine, Florida, forty miles away from Jacksonville (R. 56, 81), and identified two cards, one as an agreement for the leasing of a safe deposit box in said bank (signed as he claimed by one Arthur Starke), and the other as a card reflecting the dates upon which said Starke visited said safe deposit box (R. 56-58). He testified that in the course of his duties in the aforementioned bank he had observed Arthur Starke, whom he claimed to be the petitioner, visit the aforementioned safe deposit box (R. 58-59). The second witness, one Gene Zapf (R. 62-71), manager of the Casa Marina Hotel of Jacksonville Beach, Florida, twenty miles away from Jacksonville (R. 71), testified that petitioner had been a guest at said hotel and identified a card which he produced as the registration card signed by petitioner under the name of Arthur Starke when he engaged a room in said hotel (R. 62-65). *This was the whole of the Government's direct case* (R. 84, 90).

It was stipulated by the Government that if certain named persons were called by petitioner to testify to his character, they would in each instance state that the

petitioner bore an excellent reputation for honesty and veracity (R. 90-91).

Petitioner, in his own behalf (R. 91-97), stated that while he had been in Florida on a number of occasions, the purpose of his visits was entirely unrelated to any of the matters alleged in the indictment; that he had gone there to establish a business venture with one Arthur Feinberg, whom he had met on a previous trip to Miami, Florida (R. 91-94). Petitioner denied knowing any of the other defendants named in the indictment and further denied that he had any complicity in either the conspiracy or any of the acts referred to in the indictment and maintained his complete innocence of all charges against him (R. 94-95). With respect to the business venture of petitioner in Florida, his testimony is corroborated in all aspects by that of his wife (R. 98).

Prior to the time that petitioner testified, applications had been made in the District Court for orders directing the issuance of open commissions to take the testimony of all defendants named in the indictment who were in custody. The taking of these depositions was attended by counsel for the Government and petitioner (R. 88-89, 116, 164, 185), as well as Special Agent Roger L. Main (R. 129, 160). Each of these persons whose depositions were so taken, testified under oath in an unequivocal manner that petitioner was not implicated in any manner in the commission of any of the crimes alleged in the indictment to which they had pleaded guilty and had been sentenced. These persons testified in substance that although they were in a position to know who participated in the commission of the offenses, they had never heard of or known of the existence of the petitioner as one of the participants in the crimes charged.

Thus John Dickson, then incarcerated at Atlanta Penitentiary, testified that he did not know anyone by

the name of Kassin, and when shown a photograph of petitioner, stated that he had not seen and did not know that individual and that said person was in nowise connected with any of the acts of forgery with respect to the checks of Almours Securities, Inc., or in the misappropriation of funds of the Florida National Bank of Jacksonville (R. 186, 187, 193). Dickson further stated that between April 1, 1932, and May 13, 1932, the dates referred to in the indictment, he had occasion to see and talk to all persons connected with the series of operations referred to in the indictment and never spoke to nor saw petitioner during that time or at any other time, although had petitioner participated in the crimes charged in the indictment, Dickson had been in a position to have known and met him at some time during the commission of the crimes (R. 194, 196).

Richard Gillman, another defendant, then in custody at the Florida State Penitentiary, after being shown a photograph of petitioner, stated that he did not know the individual represented by the photograph and theretofore had no contact or dealings with him; that, although he knew all the persons connected with the crimes charged in the indictment, he had never seen, discussed with or heard discussed in the presence of petitioner any of the details of the crimes mentioned in the indictment; and that to his knowledge petitioner was not connected with such crimes (R. 117-119, 132, 135).

David N. Chadwick, another of the defendants who stated he was familiar with the major portion of the defendants named in the indictment, testified, when shown a photograph of petitioner, that he did not know petitioner and was not in anywise connected with the conspiracy to defraud the Florida National Bank of Jacksonville (R. 165-167). Cross examined, Chadwick reiterated his assertion that he had never seen petition-

er at any time and that petitioner was not connected with the crimes charged in the indictment (R. 167, 171, 174).

Julius L. Chadwick, another of the defendants whose deposition was taken, stated, when shown a photograph of petitioner, that he did not know the person represented by such photograph and that that person had nothing to do with the transactions referred to in the indictment (R. 176).

Leo Carr, whose deposition was also introduced in evidence, testified that he had been in a position to know all of the persons who participated in the crimes charged in the indictment, and that petitioner did not participate therein. Shown a photograph of petitioner, he stated that he had never seen nor heard of petitioner, nor did he know one Arthur Starke, who had registered in the Casa Marina Hotel at Jacksonville Beach, Florida, in April, 1932, and while he knew every person connected with the crimes charged in the indictment, neither petitioner nor said Arthur Starke participated in such crimes (R. 177-178, 183-185).

MacDonnell, who had been fully examined by the Assistant United States Attorney in May, 1933, (R. 54) was recalled a year later (May 12, 1934; R. 101, 103) to testify as to certain facts not previously mentioned. He testified that he "thought" he had seen one Goldberg, another defendant, enter the lobby of the St. Augustine National Bank in the company of petitioner. (This bank was totally disconnected with the defrauded bank.) As the basis for this belief he stated that he had seen petitioner and said Goldberg enter the lobby of the bank together (R. 105, 106, 107-108). He could not fix the date of this occurrence other than in a general way (R. 105). Cross examined, he admitted that he had not seen said Goldberg and petitioner together at any time while they were at the bank; that he did not see them

leave the bank together (R. 110-111, 112). Petitioner unequivocally denied ever being in the company of Goldberg (R. 138-139). There was no proof adduced that the contents of the vault in the St. Augustine National Bank had any relationship in any respect whatsoever to the matters charged in the indictment.

Application was thereafter made for an order directing the issuance of an open commission to take the testimony of the aforementioned Goldberg. Upon being interviewed by an attorney, Irving Laudeutcher, said Goldberg stated he absolutely declined to make any deposition because he was then awaiting trial under the indictment (R. 139, 141). Interrogated by the Assistant United States Attorney, he (Laudeutcher) said that said Goldberg had stated to him that petitioner was absolutely innocent of the commission of any of the offenses named in the indictment (R. 143, 145).

As a rebuttal witness the Government called Special Agent Roger L. Main of the Department of Justice (R. 148-163), who was permitted over the persistent objection and exception by counsel for petitioner (R. 148-149, 151-152, 153-154, 155, 156, 157, 158, 159, 162-163) to testify concerning conversations alleged to have been had by him with David Chadwick and John Dickson, two of the co-defendants who had given depositions favorable to petitioner. In substance, Special Agent Main testified that in these conversations David Chadwick and John Dickson made statements inconsistent with the testimony given by them upon the taking of the depositions; that whereas when David Chadwick and John Dickson made depositions to the effect that petitioner was not known to them and was innocent of any wrongdoing, each of them had stated to Special Agent Main that petitioner was known to them and had in fact participated to a large degree in the commission of the offenses named in the indictment (R. 149-150, 153-158, 159-161). Nothing in

any of the depositions may be said to constitute a foundation for such hearsay and prejudicial testimony. There is no suggestion even in the deposition taken from the said David Chadwick and John Dickson that they had made contradictory or inconsistent statements at another time. It was pointed out to the Commissioner that no proper foundation had been laid for the introduction of this testimony, since to be admissible in evidence such statements, with the time, place and circumstances under which they were made, must be brought to the attention of the witnesses who were alleged to have made them. However, the Commissioner overruled these objections.

Scrutiny of the record fails to reveal *any* evidence connecting the petitioner with *any* of the crimes charged in the indictment. All of the evidence introduced by the Government tended merely to establish merely that the petitioner was in the State of Florida at various times, a fact admitted by the petitioner when testifying in his own behalf. Nothing was shown connecting the petitioner, while in Florida, or elsewhere, with the crimes charged in the indictment.

The Circuit Court of Appeals granted a five day stay in this case pending application to this Court for a stay pending certiorari. Such an application was made to Mr. Justice Harlan F. Stone. On that application Mr. Justice Stone required the Solicitor General to submit "substantial evidence", or evidence "to go by" warranting the conclusion that there was probable cause in this case. A memorandum of the facts on this matter was submitted to Mr. Justice Stone by the Solicitor General. A memorandum on the facts was also submitted on behalf of the petitioner. Mr. Justice Stone granted the stay to the petitioner pending the determination on the application for certiorari.

Thus a case is presented to this Court in which any and every fact which relates to the proof of probable

cause exculpates the petitioner. We do not ask this Court to intervene on conflicting, debatable or controversial issues of fact as to the guilt or innocence of the petitioner. We do ask this Court to intervene in a case of this character where all of the evidence which has any logical or material relevancy on the issue of probable cause is overwhelmingly in favor of the petitioner. There was and is no probable cause, or any cause, to warrant petitioner's removal to Florida.

Specifications of Errors to Be Urged.

1. There was no probable cause for believing petitioner guilty of the offenses charged in the indictment so as to warrant his removal.

2. It was error for the District Court and the Circuit Court of Appeals to refuse to determine that there was no probable cause to warrant petitioner's removal, and not to overrule the finding of the Commissioner to the contrary.

3. It was error for the District Court, upon the hearing of returns to the writ of habeas corpus and certiorari herein, and for the Circuit Court of Appeals, upon appeal from the order dismissing such writ, to limit review of the Commissioner's finding of probable cause to a determination of the "honesty" of the Commissioner in considering the evidence.

4. Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

Reasons for Granting the Writ.

1. That the decision of the Circuit Court of Appeals affirming the order of the District Court dismissing the

writs of habeas corpus and certiorari is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Johnson* v. *Hotchkiss*, 35 Fed. (2d) 914, with that of the Circuit Court of Appeals for the Sixth Circuit in *Meehan* v. *United States*, 11 Fed. (2d) 847, and with that of the Circuit Court of Appeals for the Third Circuit in *United States ex rel. Mayer* v. *Glass*, 25 Fed. (2d) 941. Each of the foregoing cases was brought to the attention of the Circuit Court of Appeals but that Court although recognizing the force of its authority rendered its decision "regardless of what may be the doctrine elsewhere, * * * until the Supreme Court admonishes us that we have misread *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142" (Opinion of Circuit Court of Appeals, R. 214, *et seq.*):

2. That the Circuit Court of Appeals has decided an important Federal question in a way in conflict with the applicable decisions of this Court, to wit, with the decision in *United States ex rel. Hughes* v. *Gault, supra*, which case has been so construed by the Circuit Court of Appeals as to render the decision of a United States Commissioner in a removal case virtually conclusive.

3. That the Circuit Court of Appeals in holding that the United States Commissioner in a removal proceeding was not bound to follow the rules of evidence at common law has decided an important question of Federal law which has not been but should be settled by this Court. This is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. That the rule adopted by the Circuit Court of Appeals with respect to appeals in removal proceedings has rendered "such appeals fruitless" and by judicial decision has nullified the intent of Congress expressed in

statutes that appeals were permissible in such cases. This Court should, therefore, in the exercise of its power of supervision, clarify the applicable rules of law to be followed and resolve the conflict which has arisen between the various Circuit Courts of Appeals.

5. That if the rule enunciated by the Circuit Court of Appeals, Second Circuit, remains, it will revolutionize the tradition and practice in removal proceedings and appeals throughout the United States, and by this judicial interpretation will have emasculated the necessity for a showing of probable cause warranting removal and destroyed the potency of the protection afforded by the writ of habeas corpus.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of said Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other, further and different relief in the premises as to the Court may seem just and proper.

And your petitioner will ever pray.

ARTHUR KASSIN,
Petitioner.

By DAVID P. SIEGEL,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No.

UNITED STATES OF AMERICA on the relation of ARTHUR KASSIN,
Petitioner,

—against—

HON. RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HON. GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

A memorandum opinion was filed in the District Court but is not officially reported (R. 200). The United States Circuit Court of Appeals for the Second Circuit affirmed the order dismissing the writs of habeas corpus and certiorari in a *per curiam* opinion which has not been officially reported (R. 214, *et seq.*).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 5, 1934. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented, Statement, Etc.

The questions presented, statement of the case, analysis of facts and the specifications of errors relied upon are set out in the petition.

ARGUMENT.

I.

There was no probable cause for believing the petitioner guilty of the offenses charged in the indictment so as to warrant removal, and it constituted grave error to refuse to review the Commissioner's contrary finding and/or to limit the review merely to the Commissioner's "honesty", and in failing to determine whether there was any evidence sufficient to support the finding of probable cause made by the Commissioner.

(Assignments of Error, Nos. 1-7, R. 207-208)

Primarily the problem before the Commissioner, the District Court and the Circuit Court of Appeals was whether evidence had been presented sufficient to warrant a finding of probable cause to believe that petitioner committed the offenses charged in the indictment. While the District Judge approved the finding of the Commissioner that there was probable cause, the District Judge did so upon the basis only of the evidence adduced from the witnesses MacDonnell and Zapf and did not directly pass upon the impropriety of the admission of the testimony of the witness Main (to which reference will be hereinafter made under II, *infra*) holding that even without such testimony there was probable cause for re-

moval. Petitioner contended below and it was specifically held by the Circuit Court of Appeals that the testimony of said Main was incompetent as hearsay. The case for removal must therefore necessarily rest upon the testimony of the witnesses first referred to (the subject matter of which will be discussed later in this point) and the certified copy of the indictment found in the demanding jurisdiction.

The Circuit Court of Appeals made no ruling with respect to the crucial question of the existence of probable cause for removal and failed to consider other matters vitally affecting the scope of review. That Court relying upon a prior ruling in *United States ex rel. Scharlou* v. *Pulver*, 54 Fed. (2d) 261, declared that its power of review ended once it was determined that the Commissioner had accorded petitioner a fair hearing. It said:

> "We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause, *Tinsley* v. *Treat*, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evidence which the accused chooses to bring in; and no doubt his judgment must be his own, based upon all the evidence before him, though the indictment is necessarily hearsay. But we decided, after as careful consideration as we could give it, in *U. S. ex rel. Scharlon* v. *Pulver*, 54 Fed. (2) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers, we did not commit ourselves to the sufficiency of a mere

rftual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defense, he has not really done so. Such cases will be very rare; this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. *U. S. ex rel. Kohl* v. *Mulligan*, 54 Fed. (2) 1085; *U. S. ex rel. Pugliese* v. *Pulver*, 61 Fed. (2) 1044; *U. S. ex rel. Frank* v. *Mulligan*, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread *U. S. ex rel. Hughes* v. *Gault*, 271 U. S. 142. Such appeals are therefore ordinarily fruitless."

In *United States ex rel. Scharlon* v. *Pulver, supra*, 54 Fed. (2d) 261, the Circuit Court of Appeals said (p. 263):-

"There is unquestionably much confusion in the books as to what is open for review upon such proceedings. While it is uniformly held that the indictment makes a *prima facie* case, what that means is not always clear. It may be no more than to establish a legal presumption of probable cause; on the other hand, it may itself constitute evidence of that fact. Very different consequences follow from these two views, pressed to their conclusions. A true presumption is not evidence, though it supplies its place and requires the other party to proceed with the negative. Unless he does, he loses; when he does, the presumption is out of the case, and the issue is open. On this view, therefore, as soon as the accused puts in any proof, except possibly a bare denial—the equivalent of a plea of not guilty—the indictment disappears, the prosecution must proceed with evidence of probable cause, and the commissioner must decide only between the evidence in denial and the rebuttal. This we understand to be the doctrine laid down in *Meehan* v. *U. S.*, 11 F. (2d)

847 (C. C. A. 6), and *Johnson* v *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9).

"The other view results practically in circumscribing the writ to an examination of the regularity of the proceeding; that is, as to whether the commissioner allowed the accused proper latitude in presenting his case, and really considered his proof. If he has done so, his conclusion as to the existence of probable cause is irreviewable, and the evidence in rebuttal is never important except in so far as he might without it have found the evidence of the accused persuasive. If the prosecution chooses to take the chance that the indictment alone will satisfy him, it will always be safe on habeas corpus. Perhaps the judge who orders the removal may think otherwise, but that is a different question. All this necessarily follows from a well-settled rule that in such cases—which are only a species of habeas corpus in general—the writ does not search the correctness of the conclusion as matter of fact. It only examines whether there was any evidence which could justify the finding of probable cause. (Citing cases). Once it be conceded that the indictment is itself evidence, the testimony of the accused can meet it only as proof against proof, and it will be alone enough to support the finding. The rebuttal is only cumulative, and it is never necessary to consider it upon habeas corpus.

* * *

"We hold therefore that when the accused has had full opportunity to put in his proof and it has been actually considered, he can get no relief on habeas corpus."

That the indictment is not conclusive evidence of probable cause in a removal proceeding is unquestionable. *Tinsley* v. *Treat*, 205 U. S. 20, cited with approval in the opinion below. That the removal cannot be made summarily and arbitrarily and is a judicial rather than a mere ministerial act is likewise indisputable. *Beavers*

v. *Henkel*, 194 U. S. 73, quoted with approval in *Tinsley* v. *Treat*, *supra*, as follows:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting §1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial, act."

From a procedural standpoint a *prima facie* case for removal is made out with the introduction of a certified copy of the indictment found in the demanding district and proof of the identity of the person, whose rendition is sought, as the person named in that indictment. Yet, the technical sufficiency obtained in this manner is in essence arbitrary; the result, perhaps, of a desire to give full faith and credit to proceedings in another jurisdiction. Until the time that the defendant in a removal proceeding is required to *go forward* in an attempt to establish his innocence and *a fortiori* the lack of probable cause to believe him guilty, it is of little moment as a practical matter what importance is attached or weight given to the presumption of probable cause. The crucial question is how far shall the arbitrary legal inference serve the prosecution as an element of proof when the person whose rendition is sought *goes forward* and adduces proof of his innocence.

Even in a removal proceeding an indictment is merely a formal accusation not to be considered as evidence of the guilt of petitioner. It has, therefore, not the slightest degree of significance in the determination of the question of probable cause in a case such as the one at bar where petitioner has offered irrefrageable evidence establishing his innocence. Moreover, the mantle of protection afforded by the application of the rule that a man is presumed innocent until his guilt is established beyond a reasonable doubt is also available in a large degree to the defendant in removal proceedings. This presumption of innocence drains whatever strength may be left to the presumption of probable cause after its main support, the indictment, is exposed as merely a formal accusation or charge. The conclusion, then, is inescapable that while the indictment was efficacious enough with proof of identity to complete a *prima facie* case for removal and to compel petitioner to go forward with his proof, it has no legal value as evidence as soon as doubt is raised by petitioner's proof as to the existence of probable cause. Then, the presumption afforded by the indictment is destroyed as a potent factor for all purposes.

In the case at bar petitioner effectively and conclusively established that there was no probable cause for removal. That there was *a* conspiracy shown to have existed does not justify a finding that petitioner was a participant therein. Five admitted participants in the conspiracy (David N. Chadwick, Julius L. Chadwick, Leo Carr, Richard Gillman and John Dickson) all unequivocally testified that petitioner was not connected with the conspiracy in any way. MacDonnell's testimony in no wise tended to establish probable cause. The crimes charged in the indictment relate to acts designed to defraud the Florida National Bank *of Jacksonville, Florida*, and to a conspiracy so to do (R. 19-53). MacDonnell was the

vault custodian of the St. Augustine National Bank at *St. Augustine, Florida, forty miles away from Jacksonville* (R. 56, 81). Both banks were wholly unconnected with each other. No reasonable relationship exists between the rental of the safe deposit box and the commissions of the acts to defraud the bank. No inferences can logically or reasonably be drawn from the isolated transaction stated by MacDonnell and the conspiracy to defraud the Florida National Bank at Jacksonville by the means set forth in the indictment. This proof was relevant only on the issue of identity and there being no contention made by relator of an alibi, proof of such an overt act had no relevancy to connect relator with the crimes charged in the indictment. Gene Zapf was a clerk at the Casa Marina Hotel at Jacksonville Beach, Florida, which was twenty miles away from the bank in Jacksonville (R. 62, 71). Even if this testimony proves overt act 16 of the indictment, the proof of such overt act standing alone, like the testimony of MacDonnell, is not proof connecting petitioner with the conspiracy. No reasonable relationship exists between the act of registration at the hotel and the defrauding of a bank located twenty miles away. Consequently, this testimony has no relevancy on the question of the connection of petitioner with the conspiracy. MacDonnell originally testified on May 16, 1933 (R. 54, 56). At that time he was fully examined by the Assistant United States Attorney. He was recalled a year later, on May 12, 1934 (R. 101,103), to testify with respect to certain facts not previously mentioned. He could not fix the date when he claimed he saw petitioner and Goldberg together other than in a general way (R. 105). Furthermore, on cross examination he admitted that he had not seen Goldberg and petitioner together at any time on the occasion he claimed they were at the bank and that he had not seen

them leave the bank together. His entire testimony was based on his "thought" that he had seen them enter the lobby of the bank together (R. 105, 107, 110-111, 113). Even if these facts were as testified by MacDonnell, mere association on a single occasion had no relevancy or probative potency to connect petitioner with the crimes charged in the indictment. The Government did not attempt to contradict the petitioner's testimony as to the contents of his safe deposit box, and no proof was offered to connect the contents of that safe deposit box with any of the acts charged in the indictment whereby the Florida National Bank of Jacksonville was defrauded. The evidence adduced in the Government's direct case placed petitioner in cities twenty and forty miles from the bank which was defrauded. These facts do not afford any indicia of guilt and have no bearing on the question of probable cause.

Affirmatively, it was shown by petitioner that he bore an excellent reputation for honesty and veracity. Petitioner steadfastly maintained his innocence and fully explained the facts surrounding his visit to Florida in 1932. He denied knowing any of the persons named in the indictment as co-defendants and co-conspirators with him and in this he was corroborated by all of the alleged co-conspirators who were in custody. Cross examination of petitioner failed to shake his testimony or to adduce any contradictions therein. Throughout the entire proceedings the Government was not only unable to produce any direct evidence connecting petitioner with the commission of any of the acts charged in the indictment by means whereof the Florida National Bank of Jacksonville was defrauded, but it failed to submit *any* evidence warranting the removal.

Johnson v. *Hotchkiss, supra* (C. C. A. 9), 35 Fed. (2d) 914, is on its facts strikingly similar to the case

at bar. There, defendant was indicted for conspiracy to violate the National Prohibition Act. Before the Commissioner defendant testified in his own behalf and denied his implication in the commission of any of the offenses charged in the indictment. The Circuit Court of Appeals summarized other evidence before the Commissioner as follows:

> "Four of the defendants named in the indictment also testified that they did not know the appellant, and never had any dealings of any kind with him. A number of witnesses further testified that the appellant bore a good reputation in the community in which he resided.
>
> "In rebuttal one of the prohibition agents testified that in the latter part of December, 1928, he overheard a conversation between the Superintendent of the Great Northern and Northern Pacific terminals in Seattle and J. Arthur Boyd, one of the defendants named in the indictment; that the Superintendent asked Boyd if the colored man from Portland had arrived the other night; that Boyd answered in the affirmative that he was sorry that the Superintendent did not meet him; that he handled the Portland end of the business and had been very successful. The Superintendent further asked Boyd if they were still handling liquor to Portland in baggage cars and Boyd answered in the negative, stating that they had cut that out and were transferring it down there in automobiles."

The situation in the cited case and the case at bar is parallel in every respect. It needs no argument to demonstrate that the testimony of Special Agent Main relative to statements alleged to have been made to him by two of the witnesses (who had theretofore testified under oath favorably to petitioner, inconsistent with and contradictory of their former testimony, for which no proper

foundation had been laid by the Government in the interrogation of these witnesses at the time of the taking of their deposition) is as essentially hearsay as the testimony of the prohibition agent concerning the conversation overheard by him.

In both instances the witness was permitted to testify over objection and exception by counsel as to what some other person said when such person was not before the Court or under oath.

Circuit Judge Rudkin, writing for a unanimous Court, said in part as follows:

> "It will be seen at a glance that the rebuttal testimony offered by the Government had no tendency to show probable cause. If we assume that the appellant was the colored man referred to in the conversation between the Superintendent and Boyd, the statements of Boyd were not competent evidence against the appellant, and had no tendency to connect him with the conspiracy charged. *Sugarman* v. *United States*, (No. 5915) 34 F. (2nd) 663, decided November 4, 1929. Again, testimony tending to show that the appellant was seen in the coach yards, even under suspicious circumstances, had no tendency to prove that he had committed a crime, much less the crime of conspiracy, in the Western District of Washington. If the Government established probable cause at all, therefore, it was through the copy of the indictment, and that alone.
>
> "In discussing the effect of an indictment in such cases the Circuit Court of Appeals for the Sixth Circuit, in *Meehan* v. *United States*, 11 F. (2d) 847, 849, said:
>
> > 'When we come to the function of the indictment as evidence, we find some confusion in the cases, or at least in the thoughts expressed. If it were taken as *prima facie* evidence of guilt, in the largest sense of the term

> *"prima facie"*, logical difficulties would arise, because then it would continue of full force, and at the end of every removal proceeding there would be a conflict of evidence, which that tribunal could not try. The cases usually speak of it as *prima facie* evidence, not of guilt, but of the existence of probable cause. This is perhaps another way of saying that it raises an initial presumption, which might as well be arbitrary as evidential, which continues until it is in some vital particular overcome by entirely convincing testimony. Wherever there is affirmative proof, unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment the removal should be made. These we take to be the applicable principles as expressed in the late cases. *Haas* v. *Henkel*, 216 U. S. 462; *Price* v. *Henkel*, 216 U. S. 488; *Beavers* v. *Henkel*, 194 U. S. 73, 85; *Morse* v. *U. S.*, 267 U. S. 80.'
>
> "Measured by this rule, we think the government failed in its proof. As against the indictment, the appellant offered uncontradicted testimony tending to show that he was not guilty of the offense charged, and in this he was corroborated by other witnesses. *This* testimony, we think, was sufficient to overcome any presumption arising from the indictment, and it was then incumbent on the government to offer some additional proof tending to show probable cause. In this respect the government utterly failed."

In *Meehan* v. *United States*, 11 Fed. (2d) 847, 849, it was said:

> "Wherever there is affirmative proof unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied." (Cases cited.)

In *United States* v. *Glass*, 25 Fed. (2d) 941, it was also held that the evidence adduced at the hearing before the Commissioner in favor of the defendant was sufficient to rebut the presumption, raised by the indictment and the defendant was discharged.

United States v. *Green*, 136 Fed. 618, is another case involving removal proceedings. The Court, in discussing the question of probable guilt and sufficiency of evidence in a removal proceeding, said (p. 627):

> *"The defendant in a criminal case is presumed to be innocent until proven guilty, and this presumption obtains in favor of a defendant accused by the government of the United States to the same extent and with the same force as when the accusation is made by an individual. This presumption of innocence obtains in a proceeding of this character.* The government is not under obligation to establish a case beyond a reasonable doubt, or beyond a doubt establish cause for believing that a crime has been committed and that the defendant is guilty of such offense. *However, suspicion, guess, surmise, conjecture, and speculation, with some evidence as a basis, do not establish probable cause in the eye of the law.* The evidence must point to crime and indicate the defendant as the probable criminal.
>
> " 'Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.' *Wheeler* v. *Nesbitt, et al.*, 24 How. 544. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.' *Heyne* v. *Blair*, 62 N. Y. 22. See, also, *Bacon* v. *Towne*, 4 Cush. 217; *Carl* v. *Ayers*, 53

N. Y. 14; *McGurn* v. *Brackett*, 33 Me. 331. 'It is a reasonable ground for believing a person guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason.' *Wanser* v. *Wyckoff*, 9 Hun. 178. See, also, *Anderson* v. *How*, 116 N. Y. 336; *Wheeler* v. *Nesbitt*, 24 How. 544; *Lack* v. *Mitchell*, 23 Ind. 67; *Hays* v. *Blizzard*, 30 Ind. 457; *Driggs* v. *Burton*, 44 Vt. 124; *Mitchell* v. *Wall*, 111 Mass. 492; *Harpham* v. *Whitney*, 77 Ill. 32. *There is no reasonable ground for believing a person guilty of a crime when the only fact proved is just as consistent with his innocence as with his guilt. There is no probable cause to believe a crime has been committed when the only fact shown is as consistent with the non-existence as the existence of a crime.* It is true that in some of the cases it is stated that 'probable cause' is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense. *Anderson* v. *How*, 116 N. Y. 336. It will be seen there must be 'circumstances sufficiently strong in themselves to warrant a cautious man in his belief,' Suspicion (Webster) is 'the act of suspecting; the imagination or apprehension of the existence of something without proof, or upon very slight evidence or upon no evidence.' No one will contend that this suspicion constitutes 'reasonable cause,' as cause must be based on known facts, or results from which the existence of facts causing the result is certain, and these facts must point to guilt in the estimation of a reasonable mind." (Italics ours.)

In *In re Wood*, 95 Fed. 288, it was held that although an indictment constitutes a *prima facie* showing of probable cause, it may be rebutted by other testimony and the prisoner in that case was discharged from custody because the evidence offered on his behalf was held to have outweighed the weight of the indictment. On page 290 the Court said:

"This question is gone into very fully in *Re Dana*, 68 Fed. 886. In that case the court quotes from the case of *In re Wolf*, 27 Fed. 606, as follows: 'If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as prima facie showing that a crime has been committed by the party charged at the place alleged, and, if nothing else appears, to order a removal of the party charged. But I have no doubt the judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. *This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed and strictly pursued.* The government asking a removal is required to fully comply with the law.' Other cases to the same effect are also cited—among them, that of *U. S.* v. *Fowkes*, 49 Fed. 50, where the court, admitting the indictment in evidence, found it insufficient on hearing the defendant's evidence; stating that the court may treat an indictment as sufficient authority for holding the relator, or it may not, as circumstances seem to require. And the Court, in *Re Dana*, in quoting from the circuit court of appeals affirming the case last cited, says: '"We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon an indictment alone, but it would be going much too far to hold that in all cases • • • the judge is precluded from hearing any other evidence than" the indictment; *and the court held that the judge was in that case justified in requiring that he should be satisfied, before he would deprive the relator of his personal liberty and order his transfer to distant state for trial (Missouri), that there was evidence on which a jury might convict in that state, and that there was no error by the judge in his requiring, after the evi-*

dence given by the defendant, "other evidence than the indictment itself, that the court in Missouri had cognizance of the offense, and in discharging the accused upon failure of the government to comply with that requirement."'" (Italics ours.)

In *United States* v. *Andrade*, 10 Fed. (2d) 572, it was held that before an order of removal is granted the Judge must be satisfied that there is probable cause to believe that the defendant sought to be removed is guilty of the offense charged. The meaning of "probable cause" is discussed in the course of the opinion where, at page 573, the Court said:

> "'The meaning of the term "probable cause" is very well defined. In *Stacey* v. *Emery*, 97 U. S. 642, 24 L. Ed. 1035, it was said to be: "Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty."'"
>
> "• • • *Wheeler* v. *Nesbitt, et al.*, 24 How. 544, 16 L. Ed. 765. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.'"

In the case of *In re Richter*, 100 Fed. 205, it was said:

> "• • • it (the indictment) is not conclusive, and if so treated for all the purposes of the examination, the just provisions in that behalf are of no practical value. In the application for removal, at least, *if doubt is raised in any material aspect of the charge the indictment must be supported by proof aliunde* • • •."

Accord: *United States* v. *Johnston*, 292 Fed. 491; *United States* v. *Greene*, 100 Fed. 941, 945, 949; *United*

States v. *Keough*, 48 Fed. (2d) 246; *Ex parte Bullard*, 53 Fed. (2d) 206, 207; *United States* v. *Morse*, 287 Fed. 906.

Nor does *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142, require such a rule as has been adopted in the Second Circuit. It is said in the opinion of the Circuit Court of Appeals that the Court is not committed to the proposition that the reception of evidence adduced by a defendant in removal proceedings is a mere ritual and that the Commissioner would be required to give reasonable latitude to the defendant in the presentation of his proof. Nevertheless the Court in the instant case has definitely taken the position that the finding of the Commissioner as to probable cause will not be disturbed "no matter how flagrantly mistaken he may be" and in an earlier decision (*United States ex rel. Scharlon* v. *Pulver*, *supra*, 54 Fed. (2d) 261) "if the prosecution chooses to take the chance that the indictment alone will satisfy him it will always be safe on habeas corpus." These views cannot possibly be reconciled with the thought that the writ of habeas corpus in removal proceedings affords the defendant the opportunity intended for him by the decision of this Court in *Tinsley* v. *Treat*, *supra*, 205 U. S. 20, to have tested the question as to whether or not there was evidence independent of the indictment sufficient to support a finding of probable cause to believe him guilty. It is clear, of course, that the Commissioner is not required "to hold a preliminary trial and if probable cause is shown on the Government's side to set it aside because on the other evidence he believes the defendant innocent," but that is decidedly different from holding that the finding of probable cause will not be reviewed if a duly certified copy of the indictment found in the demanding jurisdiction be present as part of the Government's case for removal.

In the case of *United States ex rel. Hughes* v. *Gault, supra*, there was in fact evidence other than the indictment showing the relator's complicity in the crimes alleged in the indictment. The relator there proposed to show that the charge made against him and a large number of other persons, firms and corporations, of having violated the Sherman Anti-Trust Law, was groundless, and after having been permitted to introduce a quantity of "defensive" evidence sought to further develop his case by the submission of confirmatory proof. The petitioner in the case at bar conclusively established by the testimony of all of the persons admittedly implicated in the commission of the offense charged in the indictment, as well as by other proof, that he had *nothing* whatsoever to do with any of the things or matters charged in the indictment. *The competent evidence made him a stranger to the case rather than one who seeks to excuse himself for the commission of the acts constituting the charge against him.* The question is a pointed one. Shall the fact that the Commissioner gave "latitude" to a defendant in removal proceedings in the presentation of his proof be a bar to a review of the finding made by him even if there is no evidence sufficient to support the conclusion reached? And is it true that the decision of the Commissioner is "safe on habeas corpus" even if it finds support only in the indictment and there is an overwhelming amount of undisputed proof establishing conclusively that the defendant was not implicated in any manner in the commission of the offenses charged in the indictment? It is evident that nothing has been said by this Court authorizing the view that the Commissioner's decision must stand no matter how "flagrantly mistaken" or palpably unjust it may be.

It is respectfully submitted that the statement made in the opinion by Mr. Justice Holmes in the case of

United States ex rel. Hughes v. *Gault, supra,* with respect to the informality of removal proceedings and the rules of evidence applicable thereto was *obiter dicta* inasmuch as the only question of evidence presented concerned itself with the discretion of the Commissioner in excluding certain confirmatory proof and that matter was not passed upon in the decision of this Court. It does not appear that it was intended to allow for the reception of hearsay and incompetent evidence such as that of the testimony of the witness Main.

In the light of the facts in the case at bar and under the authorities cited we submit that the Circuit Court of Appeals erred in limiting its jurisdiction to the purely formal determination of whether or not the Commissioner had heard the evidence. Essential and important it was to determine whether the Commissioner had reached a valid and legal conclusion. Otherwise to rule was to abdicate the powers of judicial review of the Commissioner's acts and to render nugatory all the safeguards theretofore erected in removal proceedings. The questions involved are of the utmost importance not only in the case at bar, but in all removal proceedings, and it is essential for this Court clearly to enunciate the applicable rules and to resolve the controversy which has arisen through the radical attitude adopted by the Circuit Court of Appeals for the Second Circuit.

II.

Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

(Assignments of Error Nos. 8 to 11, R. 208-209)

That the rebuttal testimony of Special Agent Main with respect to alleged inconsistent and contradictory statements made by witnesses for petitioner was incom-

petent, is clear beyond question. *Larkin* v. *Nassau Electric R. R. Co.*, 205 N. Y. 267; *Ayers* v. *Watson*, 132 U. S. 394; *Mattox* v. *United States*, 156 U. S. 327; *Bennett* v. *Hoffman*, 289 Fed. 797, 799. His testimony was likewise incompetent to show bias, prejudice, hostility, interest or hope for reward on the part of said witnesses unless a proper foundation was laid therefor. *People* v. *Mallon*, 116 App. Div. 425, affirmed 189 N. Y. 520; *Stacy* v. *Graham*, 14 N. Y. 492; *Taylor* v. *United States*, 89 Fed. 954, 956. This was conceded by the Circuit Court of Appeals which wrote:

> "The relator raises a second point. On rebuttal the prosecution called witnesses to impeach two of the accused's witnesses by imputing to them statements contradictory to their testimony on the stand. The ground had not been prepared for this evidence by asking the impeached witnesses on cross-examination whether they had not so contradicted themselves. That was indeed a condition and made the testimony in rebuttal incompetent, especially as the prosecution apparently already knew the contradictions at the time of the cross-examination. Wigmore §1025. Thus the commissioner considered evidence which strictly he should not have heard. Nevertheless we are not disposed to require him to reconsider his decision. There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in court. *U. S.* v. *Greene*, 108 F. R. 816, 819, 820; *U. S.* v. *Kallas*, 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in *U. S. ex rel. Hughes* v. *Gault*, *supra* (271 U. S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradic-

tion and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings."

Such reasoning is not tenable, either under the authorities or upon the facts of the case at bar. *Special Agent Main was present when the depositions of the witnesses for petitioner were taken. The contradiction was already known to him at that time. No effort was then made to cross-examine on this point, although cross-examination was both extensive and thorough.*

There was no duty upon petitioner to obtain an explanation of an alleged contradiction under these circumstances. A year had elapsed between the time the depositions were taken and the date of Main's testimony. Nor was opportunity given to petitioner to obtain such explanation at that time. The Government pressed for final determination and contended the testimony was relevant and competent. In this the Commissioner concurred.

To say that the ordinary rules of evidence are inapplicable in removal proceedings is to disregard the well established rule that such proceedings are in their very nature judicial and not ministerial. The Commissioner acts as an inferior judicial official rather than as a ministerial officer. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, and is controlled and guided by the commonly applied principles of legal evidence. He proceeds under Section 591 of Title 18, United States Code according to the law of the state wherein he sits. *United States* v. *Morse*, 287 Fed. 906; *United States* v. *Beavers*, 125 Fed. 778. This necessarily includes the rules of evidence of that state.

In removal proceedings the Commissioner must act

upon competent and legal evidence. *Cf. Greene* v. *Henkel,* 183 U. S. 249. His powers in this regard are analogous to those of referees and special masters in bankruptcy, to committing magistrates and to other officials whose acts and conduct are subject to judicial review. *People ex rel. Perkins* v. *Moss,* 187 N. Y. 110; *People* v. *Shenk,* 142 N. Y. Supp. 1081; *Moore* v. *Harvey,* 236 App. Div. 815, 260 N. Y. Supp. 142.

In *People ex rel. Perkins* v. *Moss, supra,* 187 N. Y. 410, the Court said:

> "If the information which was laid before the magistrate furnished no *legal evidence* of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime charged had been committed, he was without jurisdiction to cause the arrest of the relator, and the latter was entitled to resort at once for his protection through a writ of habeas corpus."

In *United States* v. *Green,* 100 Fed. 941, it was held that under Section 591, the proceeding before a Commissioner for the commitment of a person so arrested, is the same as that prescribed by the laws of the State for proceedings before an examining magistrate; the only issue before the Commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged. The evidence admissible upon that issue is determined by the State practice.

In *People* v. *Shenk,* 142 N. Y. Supp. 1081, it was held that the *prima facie* case before the committing magistrate must be based upon legally competent evidence. Authorities holding for the proposition that the Magistrate's Court and the United States Commissioner must found their conclusions upon legally competent evidence may be multiplied *ad infinitum.* The Federal Courts are even more careful than the local Courts in

the reception of only legally competent evidence upon a preliminary hearing. The fatal defect in the proof adduced through Special Agent Main is not founded upon technical considerations, but on the contrary rests upon extremely well-established principles of law which find support in common sense and sound logic and is ground for reversal.

Neither *United States* v. *Greene*, 108 Fed. 816, nor *United States* v. *Kallas*, 272 Fed. 742 (both of which District Court decisions were cited by the Circuit Court of Appeals) establish the principle that rules of evidence are inapplicable in a removal proceeding. In both cases stress was laid upon the necessity of resting a finding of probable cause upon *competent* evidence. Nor does the reasoning in *United States ex rel. Hughes* v. *Gault, supra*, 271 U. S. 142, require such a rule. This Court in that case did not specifically decide the point now involved and the remarks in the opinion concerning hearings before laymen in removal proceedings were not intended to cover such a situation as is here presented. Most removal proceedings are instituted before United States Commissioners. All removal orders are signed by United States District Judges. This is a judicial act. It would be an unfortunate as well as illogical precedent which would sanction the presentation of incompetent and hearsay testimony in a removal proceeding so that the judicial duty of the District Judge to sign such removal order would necessarily have to be based upon *non-judicial* hearsay and incompetent evidence. The questions here presented are novel and have never been passed upon by this Court. They are meritorious ground for review.

CONCLUSION.

The evidence, including even the utterly incompetent testimony of Special Agent Main adduced in a belated

and desperate effort to support the application for removal, properly evaluated, leaves no room to doubt that petitioner not only completely destroyed the initial, technical presumption of probable cause arising from the indictment and proof of identity, but overwhelmingly establish his innocence of any wrongdoing (compare the statement of Mr. Creel at R. 102). Counsel for the Government in the demanding jurisdiction as well as in the remanding jurisdiction must have known at all times of the availability of Special Agent Main's testimony. Main was present when the depositions were taken. The one and only explanation for the Government's failure to call Special Agent Main to the stand during the year and a half that the proceeding has been in progress was the conviction of counsel for the Government that the testimony of Special Agent Main was hearsay and incompetent.

What value in law can Special Agent Main's testimony as to what certain witnesses said to him out of court and not under oath, inconsistent with and contradictory of their sworn testimony, have against the cumulative weight of petitioner's uncontradicted statement establishing his innocence, beyond peradventure of doubt, the testimony of his wife and character witnesses and the sworn depositions of five of the defendants named in the indictment attesting to petitioner's complete innocence?

It is respectfully submitted that to order the removal of petitioner upon the basis offered therefor by the Government is tantamount to annihilating the safeguards developed by the law against the injudicious removal of a person to a foreign jurisdiction and to unjustifiably subject him to all of the sufferings and hardships that such an order entails.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID P. SIEGEL,
Counsel for Petitioner.

INDEX.

PAGE

Brief for Petitioner 1

Opinions Below 1

Jurisdiction 1

Statement 2

Analysis of Facts 2

Questions Presented 8

Specifications of Errors 8

Argument 9

I—There was no probable cause for believing the petitioner guilty of the offenses charged in the indictment so as to warrant removal, and it constituted grave error to refuse to review the Commissioner's contrary finding and/or to limit the review merely to the Commissioner's "honesty," and in failing to determine whether there was any evidence sufficient to support the finding of probable cause made by the Commissioner 9

II—Admission of the testimony of Special Agent Main was prejudicial and contrary to law 24

Conclusion—The order of the Circuit Court of Appeals for the Second Circuit and that of the District Court for the Southern District of New York should be reversed, the writs of habeas corpus and certiorari sustained and the petitioner discharged 29

TABLE OF CASES.

	PAGE
Ayers v. Watson, 132 U. S. 394	24
Beavers v. Henkel, 194 U. S. 73	12
Bennett v. Hoffman, 289 Fed. 797	24
Ex Parte Bullard, 53 Fed. (2d) 206	22
Go-Bart Importing Co. v. U. S., 282 U. S. 344	26
Greene v. Henkel, 183 U. S. 249	26
Johnson v. Hotchkiss, 35 Fed. (2d) 914	16
Larkin v. Nassau Electric R. R. Co., 205 N. Y. 267	24
Mattox v. U. S., 156 U. S. 327	24
Meehan v. U. S., 11 Fed. (2d) 847	18
Moore v. Harvey, 236 App. Div. (N. Y.) 815	26
People v. Mallon, 116 App. Div. (N. Y.) 425, affirmed 189 N. Y. 520	25
People ex rel. Perkins v. Moss, 187 N. Y. 110	26
People v. Shenk, 142 N. Y. Supp. 1081	26, 27
Richter, Re, 100 Fed. 205	21
Stacy v. Graham, 14 N. Y. 492	25
Taylor v. U. S., 89 Fed. 954	25
Tinsley v. Treat, 205 U. S. 20	12, 22
United States v. Andrade, 10 Fed. (2d) 572	21
United States v. Beavers, 125 Fed. 778	26
United States v. Glass, 25 Fed. (2d) 941	18
United States v. Green, 136 Fed. 618	18, 27
United States v. Greene, 100 Fed. 941	22
United States v. Johnston, 292 Fed. 491	22
United States v. Kallas, 272 Fed. 742	27
United States v. Keough, 48 Fed. (2d) 246	22
United States v. Morse, 287 Fed. 906	22, 26
United States ex rel. Hughes v. Gault, 271 U. S. 142	22, 23, 27
United States ex rel. Scharlon v. Pulver, 54 Fed. (2d) 261	10, 11, 22
Wood, Re, 95 Fed. 288	20

STATUTE.

United States Code, Title 18, Section 591	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 569.

UNITED STATES OF AMERICA on the relation of ARTHUR KASSIN,
Petitioner,
against
HON. RAYMOND J. MULLIGAN, United States Marshal for the Southern District of New York, and HON. GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

BRIEF FOR PETITIONER.

Opinions Below.

A memorandum opinion was filed in the District Court but is not officially reported (R. 158). The United States Circuit Court of Appeals for the Second Circuit affirmed the order dismissing the writs of habeas corpus and certiorari in a *per curiam* opinion reported in 73 Fed. (2d) 274 (R. 166 *et seq.*).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 5, 1934. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

Petitioner and others were indicted in the United States District Court for the Southern District of Florida for alleged violations of Section 37, U. S. C. C., and Section 592 of Title 12 of the United States Code. All of the charges in the indictment relate to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of said bank (R. 13-37). Petitioner was apprehended within the Southern District of New York and arraigned before a United States Commissioner in that District on a complaint praying for his removal to the Southern District of Florida (R. 3, 10, 12, 37). Hearings were held before said Commissioner and the depositions of all of the defendants named in the indictment who were then in custody were taken and submitted to the Commissioner (R. 37-158). Removal of petitioner was recommended by the Commissioner and an order to that effect was signed by a District Judge (R. 158). Thereupon petitioner sued out writs of habeas corpus and certiorari, to which the United States Marshal and the Commissioner duly filed returns (R. 1-10). Said writs were dismissed in the District Court, and the order of dismissal was affirmed upon appeal (R. 158-162; 166 *et seq.*).

Analysis of Facts.

Each of the offenses charged in the indictment relates to an alleged scheme to defraud the Florida National Bank of Jacksonville, Florida, by means of the misapplication of the funds of that bank by the payment of forged checks drawn on the account of a depositor of that bank. Petitioner is charged both as a conspirator and as an aider and abettor (R. 13-37). After introducing a certified copy of the indictment (R. 37-38, 53-54), two witnesses were called to identify petitioner as one of the defendants named therein. The first of these witnesses, Augustus O. MacDonnell (R. 39-44, 53-56, 56-63), described himself as the vault custodian of the

St. Augustine National Bank of St. Augustine, Florida, forty miles away from Jacksonville (R. 39, 60), and identified two cards, one as an agreement for the leasing of a safe deposit box in said bank (signed as he claimed by one Arthur Starke), and the other as a card reflecting the dates upon which said Starke visited said safe deposit box (R. 39-41). He testified that in the course of his duties in the aforementioned bank he had observed Arthur Starke, whom he claimed to be the petitioner, visit the aforementioned safe deposit box (R. 41-42). The second witness, one Gene Zapf (R. 44-53), manager of the Casa Marina Hotel of Jacksonville Beach, Florida, twenty miles away from Jacksonville (R. 53), testified that petitioner had been a guest at said hotel and identified a card which he produced as the registration card signed by petitioner under the name of Arthur Starke when he engaged a room in said hotel (R. 44-47). *This was the whole of the Government's direct case* (R. 63, 68).

It was stipulated by the Government that if certain named persons were called by petitioner to testify to his character, they would in each instance state that the petitioner bore an excellent reputation for honesty and veracity (R. 68).

Petitioner, in his own behalf (R. 68-74), stated that while he had been in Florida on a number of occasions, the purpose of his visits was entirely unrelated to any of the matters alleged in the indictment; that he had gone there to establish a business venture with one Arthur Feinberg, whom he had met on a previous trip to Miami, Florida (R. 68-71). Petitioner denied knowing any of the other defendants named in the indictment and further denied that he had any complicity in either the conspiracy or any of the acts referred to in the indictment and maintained his complete innocence of all charges against him (R. 71-72). With respect to the business venture of petitioner in Florida, his testimony is corroborated in all aspects by that of his wife (R. 74).

Prior to the time that petitioner testified, applications had been made in the District Court for orders directing the issuance of open commissions to take the testimony of all defendants named in the indictment who were in custody. The

taking of these depositions was attended by counsel for the Government and petitioner (R. 63-64, 89, 129, 145), as well as Special Agent Roger L. Main (R. 101, 126). Each of these persons whose depositions were so taken, testified under oath in an unequivocal manner that petitioner was not implicated in any manner in the commission of any of the crimes alleged in the indictment to which they had pleaded guilty and had been sentenced. These persons testified in substance that although they were in a position to know who participated in the commission of the offenses, they had never heard of or known of the existence of the petitioner as one of the participants in the crimes charged.

Thus John Dickson, then incarcerated at Atlanta Penitentiary, testified that he did not know anyone by the name of Kassin, and when shown a photograph of petitioner, stated that he had not seen and did not know that individual and that said person was in nowise connected with any of the acts of forgery with respect to the checks of Almours Securities, Inc., or in the misappropriation of funds of the Florida National Bank of Jacksonville (R. 146, 147, 152). Dickson further stated that between April 1, 1932, and May 13, 1932, the dates referred to in the indictment, he had occasion to see and talk to all persons connected with the series of operations referred to in the indictment and never spoke to nor saw petitioner during that time or at any other time, although had petitioner participated in the crimes charged in the indictment, Dickson had been in a position to have known and met him at some time during the commission of the crimes (R. 153, 155).

Richard Gillman, another defendant, then in custody at the Florida State Penitentiary, after being shown a photograph of petitioner, stated that he did not know the individual represented by the photograph and theretofore had no contact or dealings with him; that, although he knew all the persons connected with the crimes charged in the indictment, he had never seen, discussed with or heard discussed in the presence of petitioner any of the details of the crimes mentioned in the indictment; and that to his knowledge petitioner was not connected with such crimes (R. 90-92, 103, 106).

David N. Chadwick, another of the defendants who stated he was familiar with the major portion of the defendants named in the indictment, testified, when shown a photograph of petitioner, that he did not know petitioner and was not in anywise connected with the conspiracy to defraud the Florida National Bank of Jacksonville (R. 129-131). Cross-examined, Chadwick reiterated his assertion that he had never seen petitioner at any time and that petitioner was not connected with the crimes charged in the indictment (R. 131, 134, 137).

Julius L. Chadwick, another of the defendants whose deposition was taken, stated, when shown a photograph of petitioner, that he did not know the person represented by such photograph and that that person had nothing to do with the transactions referred to in the indictment (R. 138).

Leo Carr, whose deposition was also introduced in evidence, testified that he had been in a position to know all of the persons who participated in the crimes charged in the indictment, and that petitioner did not participate therein. Shown a photograph of petitioner, he stated that he had never seen nor heard of petitioner, nor did he know one Arthur Starke, who had registered in the Casa Marina Hotel at Jacksonville Beach, Florida, in April, 1932, and while he knew every person connected with the crimes charged in the indictment, neither petitioner nor said Arthur Starke participated in such crimes (R. 139-140, 144-145).

MacDonnell, who had been fully examined by the Assistant United States Attorney in May, 1933 (R. 37), was recalled a year later (May 12, 1934; R. 76, 79) to testify as to certain facts not previously mentioned. He testified that he "thought" he had seen one Goldberg, another defendant, enter the lobby of the St. Augustine National Bank in the company of petitioner. (This bank was totally disconnected with the defrauded bank.) As the basis for this belief he stated that he had seen petitioner and said Goldberg enter the lobby of the bank together (R. 80, 81, 82-83). He could not fix the date of this occurrence other than in a general way (R. 80). Cross-examined, he admitted that he had not seen said Goldberg and petitioner together at any time while they were

at the bank; that he did not see them leave the bank together (R. 85-86). Petitioner unequivocally denied ever being in the company of Goldberg (R. 108-109). There was no proof adduced that the contents of the vault in the St. Augustine National Bank had any relationship in any respect whatsoever to the matters charged in the indictment.

Application was thereafter made for an order directing the issuance of an open commission to take the testimony of the aforementioned Goldberg. Upon being interviewed by an attorney, Irving Laudeutcher, said Goldberg stated he absolutely declined to make any deposition because he was then awaiting trial under the indictment (R. 109, 110). Interrogated by the Assistant United States Attorney, he (Laudeutcher) said that said Goldberg had stated to him that petitioner was absolutely innocent of the commission of any of the offenses named in the indictment (R. 113-114).

As a rebuttal witness the Government called Special Agent Roger L. Main of the Department of Justice (R. 116-128), who was permitted over the persistent objection and exception by counsel for petitioner (R. 117, 119-121, 122, 123, 124-125, 127-128) to testify concerning conversations alleged to have been had by him with David Chadwick and John Dickson, two of the co-defendants who had given depositions favorable to petitioner. In substance, Special Agent Main testified that in these conversations David Chadwick and John Dickson made statements inconsistent with the testimony given by them upon the taking of the depositions; that whereas when David Chadwick and John Dickson made depositions to the effect that petitioner was not known to them and was innocent of any wrongdoing, each of them had stated to Special Agent Main that petitioner was known to them and had in fact participated to a large degree in the commission of the offenses named in the indictment (R. 118, 120-124, 125-126). Nothing in any of the depositions may be said to constitute a foundation for such hearsay and prejudicial testimony. There is no suggestion even in the deposition taken from the said David Chadwick and John Dickson that they had made contradictory or inconsistent statements at another time. It was pointed out

to the Commissioner that no proper foundation had been laid for the introduction of this testimony, since to be admissible in evidence such statements, with the time, place and circumstances under which they were made, must be brought to the attention of the witnesses who were alleged to have made them. However, the Commissioner overruled these objections.

Scrutiny of the record fails to reveal *any* evidence connecting the petitioner with *any* of the crimes charged in the indictment. All of the evidence introduced by the Government tended merely to establish merely that the petitioner was in the State of Florida at various times, a fact admitted by the petitioner when testifying in his own behalf. Nothing was shown connecting the petitioner, while in Florida or elsewhere, with the crimes charged in the indictment.

The Circuit Court of Appeals granted a five-day stay in this case pending application to this Court for a stay pending certiorari. Such an application was made to Mr. Justice Harlan F. Stone. On that application Mr. Justice Stone required the Solicitor General to submit "substantial evidence," or evidence "to go by" warranting the conclusion that there was probable cause in this case. A memorandum of the facts on this matter was submitted to Mr. Justice Stone by the Solicitor General. A memorandum on the facts was also submitted on behalf of the petitioner. Mr. Justice Stone granted the stay to the petitioner pending the determination on the application for certiorari.

Thus a case is presented to this Court in which any and every fact which relates to the proof of probable cause exculpates the petitioner. We do not ask this Court to intervene on conflicting, debatable or controversial issues of fact as to the guilt or innocence of the petitioner. We do ask this Court to intervene in a case of this character where all of the evidence which has any logical or material relevancy on the issue of probable cause is overwhelmingly in favor of the petitioner. There was and is no probable cause, or any cause, to warrant petitioner's removal to Florida.

Questions Presented.

1. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to determine whether there is probable cause to warrant removal and to overrule, if necessary, the finding of the Commissioner on this point.

2. Whether the District Court upon the hearing of returns to writs of habeas corpus and certiorari in removal proceedings and the Circuit Court of Appeals, upon appeal from an order dismissing such writs, had the power and jurisdiction to review the finding of probable cause made by the Commissioner, and, if necessary, to overrule such finding.

3. Whether the power and jurisdiction of the District Court and, upon appeal, of the Circuit Court of Appeals to review the finding of probable cause made by the Commissioner is limited strictly to a determination of the *honesty* of the Commissioner in considering the evidence.

4. Whether there was any evidence from which to find probable cause of the connection of the petitioner with the crimes charged in the indictment so as to warrant his removal.

5. Whether in a removal proceeding a United States Commissioner may proceed without regard to the rules of the common law governing the admissibility of evidence, and whether, in such event, the determination of the said Commissioner is valid and binding.

Specifications of Errors to Be Urged.

1. There was no probable cause for believing petitioner guilty of the offenses charged in the indictment so as to warrant his removal.

2. It was error for the District Court and the Circuit Court of Appeals to refuse to determine that there was no probable cause to warrant petitioner's removal, and not to overrule the finding of the Commissioner to the contrary.

3. It was error for the District Court, upon the hearing of returns to the writ of habeas corpus and certiorari herein, and for the Circuit Court of Appeals, upon appeal from the order dismissing such writ, to limit review of the Commissioner's finding of probable cause to a determination of the "honesty" of the Commissioner in considering the evidence.

4. Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

ARGUMENT.

I.

There was no probable cause for believing the petitioner guilty of the offenses charged in the indictment so as to warrant removal, and it constituted grave error to refuse to review the Commissioner's contrary finding and/or to limit the review merely to the Commissioner's "honesty," and in failing to determine whether there was any evidence sufficient to support the finding of probable cause made by the Commissioner.

(Assignments of Error Nos. 1-7, R. 162-163.)

Primarily the problem before the Commissioner, the District Court and the Circuit Court of Appeals was whether evidence had been presented sufficient to warrant a finding of probable cause to believe that petitioner committed the offenses charged in the indictment. While the District Judge approved the finding of the Commissioner that there was probable cause, the District Judge did so upon the basis only of the evidence adduced from the witnesses MacDonnell and Zapf and did not directly pass upon the impropriety of the

admission of the testimony of the witness Main (to which reference will be hereinafter made under II, *infra*), holding that even without such testimony there was probable cause for removal. Petitioner contended below and it was specifically held by the Circuit Court of Appeals that the testimony of said Main was incompetent as hearsay. The case for removal must therefore necessarily rest upon the testimony of the witnesses first referred to (the subject-matter of which will be discussed later in this point) and the certified copy of the indictment found in the demanding jurisdiction.

The Circuit Court of Appeals made no ruling with respect to the crucial question of the existence of probable cause for removal and failed to consider other matters vitally affecting the scope of review. That Court, relying upon a prior ruling in *United States ex rel. Scharlon* v. *Pulver*, 54 Fed. (2d) 261, declared that its power of review ended once it was determined that the Commissioner had accorded petitioner a fair hearing. It said:

> "We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause. *Tinsley* v. *Treat*, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evidence which the accused chooses to bring in; and no doubt his judgment must be his own, based upon all the evidence before him, though the indictment is necessarily hearsay. But we decided, after as careful consideration as we could give it, in *U. S. ex rel. Scharlon* v. *Pulver*, 54 Fed. (2) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers, we did not commit ourselves to the sufficiency of a mere ritual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defense, he has not really done so. Such cases will be very rare;

this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. *U. S. ex rel. Kohl* v. *Mulligan*, 54 Fed. (2) 1085; *U. S. ex rel. Pugliese* v. *Pulver*, 61 Fed. (2) 1044; *U. S. ex rel. Frank* v. *Mulligan*, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread *U. S. ex rel. Hughes* v. *Gault*, 271 U. S. 142. Such appeals are therefore ordinarily fruitless."

In *United States ex rel. Scharlon* v. *Pulver*, *supra*, 54 Fed. (2d) 261, the Circuit Court of Appeals said (p. 263):

"There is unquestionably much confusion in the books as to what is open for review upon such proceedings. While it is uniformly held that the indictment makes a *prima facie* case, what that means is not always clear. It may be no more than to establish a legal presumption of probable cause; on the other hand, it may itself constitute evidence of that fact. Very different consequences follow from these two views, pressed to their conclusions. A true presumption is not evidence, though it supplies its place and requires the other party to proceed with the negative. Unless he does, he loses; when he does, the presumption is out of the case, and the issue is open. On this view, therefore, as soon as the accused puts in any proof, except possibly a bare denial—the equivalent of a plea of not guilty—the indictment disappears, the prosecution must proceed with evidence of probable cause, and the commissioner must decide only between the evidence in denial and the rebuttal. This we understand to be the doctrine laid down in *Meehan* v. *U. S.*, 11 F. (2d) 847 (C. C. A. 6), and *Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9).

"The other view results practically in circumscribing the writ to an examination of the regularity of the proceeding; that is, as to whether the commissioner allowed the accused proper latitude in presenting his case, and really considered his proof. If he has done so, his conclusion as to the existence of probable cause is irreviewable, and the evidence in rebuttal is never important except in so far as he might without it have found the evidence of the accused

persuasive. If the prosecution chooses to take the chance that the indictment alone will satisfy him, it will always be safe on habeas corpus. Perhaps the judge who orders the removal may think otherwise, but that is a different question. All this necessarily follows from a well-settled rule that in such cases—which are only a species of habeas corpus in general—the writ does not search the correctness of the conclusion as matter of fact. It only examines whether there was any evidence which could justify the finding of probable cause. (Citing cases.) Once it be conceded that the indictment is itself evidence, the testimony of the accused can meet it only as proof against proof, and it will be alone enough to support the finding. The rebuttal is only cumulative, and it is never necessary to consider it upon habeas corpus.

* * * * * * *

"We hold therefore that when the accused has had full opportunity to put in his proof and it has been actually considered, he can get no relief on habeas corpus."

That the indictment is not conclusive evidence of probable cause in a removal proceeding is unquestionable. *Tinsley* v. *Treat,* 205 U. S. 20, cited with approval in the opinion below. That the removal cannot be made summarily and arbitrarily and is a judicial rather than a mere ministerial act is likewise indisputable. *Beavers* v. *Henkel,* 194 U. S. 73, quoted with approval in *Tinsley* v. *Treat, supra,* as follows:

"It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which bught not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting §1014, Rev. Stat., which requires

that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial, act."

From a procedural standpoint a *prima facie* case for removal is made out with the introduction of a certified copy of the indictment found in the demanding district and proof of the identity of the person, whose rendition is sought, as the person named in that indictment. Yet, the technical sufficiency obtained in this manner is in essence arbitrary; the result, perhaps, of a desire to give full faith and credit to proceedings in another jurisdiction. Until the time that the defendant in a removal proceeding is required to *go forward* in an attempt to establish his innocence and *d fortiori* the lack of probable cause to believe him guilty, it is of little moment as a practical matter what importance is attached or weight given to the presumption of probable cause. The crucial question is how far shall the arbitrary legal inference serve the prosecution as an element of proof when the person whose rendition is sought *goes forward* and adduces proof of his innocence.

Even in a removal proceeding an indictment is merely a formal accusation not to be considered as evidence of the guilt of petitioner. It has, therefore, not the slightest degree of significance in the determination of the question of probable cause in a case such as the one at bar, where petitioner has offered irrefrageable evidence establishing his innocence. Moreover, the mantle of protection afforded by the application of the rule that a man is presumed innocent until his guilt is established beyond a reasonable doubt is also available in a large degree to the defendant in removal proceedings. This presumption of innocence drains whatever strength may be left to the presumption of probable cause after its main support, the indictment, is exposed as merely a formal accusation or charge. The conclusion, then, is inescapable that while the indictment was efficacious enough with proof of identity to complete a *prima facie* case for removal and to compel petitioner to go forward with

his proof, it has no legal value as evidence as soon as doubt is raised by petitioner's proof as to the existence of probable cause. Then, the presumption afforded by the indictment is destroyed as a potent factor for all purposes.

In the case at bar petitioner effectively and conclusively established that there was no probable cause for removal. That a conspiracy was shown to have existed does not justify a finding that petitioner was a participant therein. Five admitted participants in the conspiracy (David N. Chadwick, Julius L. Chadwick, Leo Carr, Richard Gillman and John Dickson) all unequivocally denied that petitioner was connected with the conspiracy in any way. MacDonnell's testimony in nowise tended to establish probable cause. The crimes charged in the indictment relate to acts designed to defraud the Florida National Bank *of Jacksonville, Florida,* and to a conspiracy so to do (R. 13-37). MacDonnell was the vault custodian of the St. Augustine National Bank at *St. Augustine, Florida, forty miles away from Jacksonville* (R. 39, 61). Both banks were wholly unconnected with each other. No reasonable relationship exists between the rental of the safe deposit box and the commissions of the acts to defraud the bank. No inferences can logically or reasonably be drawn from the isolated transaction stated by MacDonnell and the conspiracy to defraud the Florida National Bank at Jacksonville by the means set forth in the indictment. This proof was relevant only on the issue of identity and there being no contention made by relator of an alibi, proof of such an overt act could not possibly connect relator with the crimes charged in the indictment. Gene Zapf was a clerk at the Casa Marina Hotel at Jacksonville Beach, Florida, which was twenty miles away from the bank in Jacksonville (R. 44, 53). Even if this testimony proves overt act 16 of the indictment, the proof of such overt act standing alone, like the testimony of MacDonnell, is not proof connecting petitioner with the conspiracy. No reasonable relationship exists between the act of registration at the hotel and the defrauding of a bank located twenty miles away. Consequently, this testimony has no bearing on the question of the connection of petitioner with the conspiracy.

MacDonnell originally testified on May 16, 1933 (R. 37, 39). At that time he was fully examined by the Assistant United States Attorney. He was recalled a year later, on May 12, 1934 (R. 76, 78, 79), to testify with respect to certain facts not previously mentioned. He could not fix the date when he claimed he saw petitioner and Goldberg together other than in a general way (R. 80). Furthermore, on cross-examination he admitted that he had not seen Goldberg and petitioner together at any time on the occasion he claimed they were at the bank and that he had not seen them leave the bank together. His entire testimony was based on his "thought" that he had seen them enter the lobby of the bank together (R. 80, 81, 85-86). Even if these facts were as testified by MacDonnell, mere association on a single occasion had no relevancy or probative potency to connect petitioner with the crimes charged in the indictment. The Government did not attempt to contradict the petitioner's testimony as to the contents of his safe deposit box, and no proof was offered to connect the contents of that safe deposit box with any of the acts charged in the indictment whereby the Florida National Bank of Jacksonville was defrauded. The evidence adduced in the Government's direct case placed petitioner in cities twenty and forty miles from the bank which was defrauded. These facts do not afford any indicia of guilt and have no bearing on the question of probable cause.

Affirmatively, it was shown by petitioner that he bore an excellent reputation for honesty and veracity. Petitioner steadfastly maintained his innocence and fully explained the facts surrounding his visit to Florida in 1932. He denied knowing any of the persons named in the indictment as co-defendants and co-conspirators with him and in this he was corroborated by all of the alleged co-conspirators who were in custody. Cross-examination of petitioner failed to shake his testimony or to adduce any contradictions therein. Throughout the entire proceedings the Government was not only unable to produce any direct evidence connecting petitioner with the commission of any of the acts charged in the indictment by means whereof the Florida National Bank of

Jacksonville was defrauded, but it failed to submit *any* evidence warranting the removal.

Johnson v. *Hotchkiss, supra* (C. C. A. 9), 35 Fed. (2d) 914, is on its facts strikingly similar to the case at bar. There, defendant was indicted for conspiracy to violate the National Prohibition Act. Before the Commissioner defendant testified in his own behalf and denied his implication in the commission of any of the offenses charged in the indictment. The Circuit Court of Appeals summarized other evidence before the Commissioner as follows:

> "Four of the defendants named in the indictment also testified that they did not know the appellant, and never had any dealings of any kind with him. A number of witnesses further testified that the appellant bore a good reputation in the community in which he resided.
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> "In rebuttal one of the prohibition agents testified that in the latter part of December, 1928, he overheard a conversation between the Superintendent of the Great Northern and Northern Pacific terminals in Seattle and J. Arthur Boyd, one of the defendants named in the indictment; that the Superintendent asked Boyd if the colored man from Portland had arrived the other night; that Boyd answered in the affirmative that he was sorry that the Superintendent did not meet him; that he handled the Portland end of the business and had been very successful. The Superintendent further asked Boyd if they were still handling liquor to Portland in baggage cars and Boyd answered in the negative, stating that they had cut that out and were transferring it down there in automobiles."

The situation in the cited case and the case at bar is parallel in every respect. It needs no argument to demonstrate that the testimony of Special Agent Main relative to statements alleged to have been made to him by two of the witnesses (who had theretofore testified under oath favorably to petitioner, inconsistent with and contradictory of their former testimony, for which no proper foundation had been laid by the Government in the interrogation of these wit-

nesses at the time of the taking of their deposition) is as essentially hearsay as the testimony of the prohibition agent concerning the conversation overhead by him.

In both instances the witness was permitted to testify over objection and exception by counsel as to what some other person said when such person was not before the Court or under oath.

Circuit Judge Rudkin, writing for a unanimous Court, said in part as follows:

> "It will be seen at a glance that the rebuttal testimony offered by the Government had no tendency to show probable cause. If we assume that the appellant was the colored man referred to in the conversation between the Superintendent and Boyd, the statements of Boyd were not competent evidence against the appellant, and had no tendency to connect him with the conspiracy charged. *Sugarman* v. *United States* (No. 5915), 34 F. (2nd) 663, decided November 4, 1929. Again, testimony tending to show that the appellant was seen in the coach yards, even under suspicious circumstances, had no tendency to prove that he had committed a crime, much less the crime of conspiracy, in the Western District of Washington. If the Government established probable cause at all, therefore, it was through the copy of the indictment, and that alone.
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> "In discussing the effect of an indictment in such cases the Circuit Court of Appeals for the Sixth Circuit, in *Meehan* v. *United States*, 11 F. (2d) 847, 849, said:
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> > 'When we come to the function of the indictment as evidence, we find some confusion in the cases, or at least in the thoughts expressed. If it were taken as *prima facie* evidence of guilt, in the largest sense of the term *"prima facie,"* logical difficulties would arise, because then it would continue of full force, and at the end of every removal proceeding there would be a conflict of evidence, which that tribunal could not try. The cases usually speak of it as *prima facie* evidence, not of guilt, but of the existence of probable cause. This is perhaps another way of saying that it raises an initial presumption,

> which might as well be arbitrary as evidential, which continues until it is in some vital particular overcome by entirely convincing testimony. Wherever there is affirmative proof, unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment the removal should be made. These we take to be the applicable principles as expressed in the late cases. *Haas* v. *Henkel,* 216 U. S. 462; *Price* v. *Henkel,* 216 U. S. 488; *Beavers* v. *Henkel,* 194 U. S. 73, 85; *Morse* v. *U. S.* 267 U. S. 80.'
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> "Measured by this rule, we think the government failed in its proof. As against the indictment, the appellant offered uncontradicted testimony tending to show that he was not guilty of the offense charged, and in this he was corroborated by other witnesses. This testimony, we think, was sufficient to overcome any presumption arising from the indictment, and it was then incumbent on the government to offer some additional proof tending to show probable cause. In this respect the government utterly failed."

In *Meehan* v. *United States,* 11 Fed. (2d) 847, 849, it was said:

> "Wherever there is affirmative proof unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied." (Cases cited.)

In *United States* v. *Glass,* 25 Fed. (2d) 941, it was also held that the evidence adduced at the hearing before the Commissioner in favor of the defendant was sufficient to rebut the presumption raised by the indictment and the defendant was discharged.

United States v. *Green,* 136 Fed. 618, is another case involving removal proceedings. The Court, in discussing the question of probable guilt and sufficiency of evidence in a removal proceeding, said (p. 627):

> *"The defendant in a criminal case is presumed to be innocent until proven guilty, and this presumption obtains in favor of a defendant accused by the govern-*

ment of the United States to the same extent and with the same force as when the accusation is made by an individual. This presumption of innocence obtains in a proceeding of this character. The government is not under obligation to establish a case beyond a reasonable doubt, or beyond a doubt establish cause for believing that a crime has been committed and that the defendant is guilty of such offense. *However, suspicion, guess, surmise, conjecture, and speculation, with some evidence as a basis, do not establish probable cause in the eye of the law.* The evidence must point to crime and indicate the defendant as the probable criminal.

"'Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.' *Wheeler* v. *Nesbitt, et al.,* 24 How. 544. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.' *Heyne* v. *Blair,* 62 N. Y. 22. See, also, *Bacon* v. *Towne,* 4 Cush. 217; *Carl* v. *Ayers,* 53 N. Y. 14; *McGurn* v. *Brackett,* 33 Me. 331. 'It is a reasonable ground for believing a person guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason.' *Wanser* v. *Wyckoff,* 9 Hun 178. See, also, *Anderson* v. *How,* 116 N. Y. 336; *Wheeler* v. *Nesbitt,* 24 How. 544; *Lack* v. *Mitchell,* 23 Ind. 67; *Hays* v. *Blizzard,* 30 Ind. 457; *Driggs* v. *Burton,* 44 Vt. 124; *Mitchell* v. *Wall,* 111 Mass. 492; *Harpham* v. *Whitney,* 77 Ill. 32. *There is no reasonable ground for believing a person guilty of a crime when the only fact proved is just as consistent with his innocence as with his guilt. There is no probable cause to believe a crime has been committed when the only fact shown is as consistent with the non-existence as the existence of a crime.* It is true that in some of the cases it is stated that 'probable cause' is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is

guilty of the offense. *Anderson* v. *How*, 116 N. Y. 336. It will be seen there must be 'circumstances sufficiently strong in themselves to warrant a cautious man in his belief.' Suspicion (Webster) is 'the act of suspecting; the imagination or apprehension of the existence of something without proof, or upon very slight evidence or upon no evidence.' No one will contend that this suspicion constitutes 'reasonable cause,' as cause must be based on known facts, or results from which the existence of facts causing the result is certain, and these facts must point to guilt in the estimation of a reasonable mind." (Italics ours.)

In *In re Wood*, 95 Fed. 288, it was held that although an indictment constitutes a *prima facie* showing of probable cause, it may be rebutted by other testimony and the prisoner in that case was discharged from custody because the evidence offered on his behalf was held to have outweighed the weight of the indictment. On page 290 the Court said:

"This question is gone into very fully in *Re Dana*, 68 Fed. 886. In that case the court quotes from the case of *In re Wolf*, 27 Fed. 606, as follows: 'If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as prima facie showing that a crime has been committed by the party charged at the place alleged, and, if nothing else appears, to order a removal of the party charged. But I have no doubt the judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. *This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed and strictly pursued.* The government asking a removal is required to fully comply with the law.' Other cases to the same effect are also cited—among them, that of *U. S.* v. *Fowkes*, 49 Fed. 50, where the court, admitting the indictment in evidence, found it insufficient on hearing the defendant's evidence; stating that the court may treat an indictment as sufficient authority for holding the relator, or it may not, as circumstances

seem to require. And the Court, in *Re Dana,* in quoting from the circuit court of appeals affirming the case last cited, says: "We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon an indictment alone, but it would be going much too far to hold that in all cases * * * the judge is precluded from hearing any other evidence than" the indictment; *and the court held that the judge was in that case justified in requiring that he should be satisfied, before he would deprive the relator of his personal liberty and order his transfer to distant state for trial (Missouri), that there was evidence on which a jury might convict in that state, and that there was no error by the judge in his requiring, after the evidence given by the defendant, "other evidence than the indictment itself, that the court in Missouri had cognizance of the offense, and in discharging the accused upon failure of the government to comply with that requirement."'"* (Italics ours.)

In *United States* v. *Andrade,* 10 Fed. (2d) 572, it was held that before an order of removal is granted the Judge must be satisfied that there is probable cause to believe that the defendant sought to be removed is guilty of the offense charged. The meaning of "probable cause" is discussed in the course of the opinion where, at page 573, the Court said:

"'The meaning of the term "probable cause" is very well defined. In *Stacey* v. *Emery,* 97 U. S. 642, 24 L. Ed. 1035, it was said to be: "Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty."'"

"* * * *Wheeler* v. *Nesbitt, et al.,* 24 How. 544, 16 L. Ed. 765. 'Probable cause, as defined in the books, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.'"

In the case of *In re Richter,* 100 Fed. 205, it was said:

"* * * it (the indictment) is not conclusive, and if so treated for all the purposes of the examination,

> the just provisions in that behalf are of no practical value. In the application for removal, at least, *if doubt is raised in any material aspect of the charge the indictment must be supported by proof aliunde* . . ."

Accord: *United States* v. *Johnston*, 292 Fed. 491; *United States* v. *Greene*, 100 Fed. 941, 945, 949; *United States* v. *Keough*, 48 Fed. (2d) 246; *Ex parte Bullard*, 53 Fed. (2d) 206, 207; *United States* v. *Morse*, 287 Fed. 906.

Nor does *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142, require such a rule as has been adopted in the Second Circuit. It is said in the opinion of the Circuit Court of Appeals that the Court is not committed to the proposition that the reception of evidence adduced by a defendant in removal proceedings is a mere ritual and that the Commissioner would be required to give reasonable latitude to the defendant in the presentation of his proof. Nevertheless the Court in the instant case has definitely taken the position that the finding of the Commissioner as to probable cause will not be disturbed "no matter how flagrantly mistaken he may be" and in an earlier decision (*United States ex rel. Scharlon* v. *Pulver, supra*, 54 Fed. [2d] 261) "if the prosecution chooses to take the chance that the indictment alone will satisfy him it will always be safe on habeas corpus." These views cannot possibly be reconciled with the thought that the writ of habeas corpus in removal proceedings affords the defendant the opportunity intended for him by the decision of this Court in *Tinsley* v. *Treat, supra*, 205 U. S. 20, to have tested the question as to whether or not there was evidence independent of the indictment sufficient to support a finding of probable cause to believe him guilty. It is clear, of course, that the Commissioner is not required "to hold a preliminary trial and if probable cause is shown on the Government's side to set it aside because on the other evidence he believes the defendant innocent," but that is decidedly different from holding that the finding of probable cause will not be reviewed if a duly certified copy of the indictment found in the demanding jurisdiction be present as part of the Government's case for removal.

In the case of *United States ex rel. Hughes v. Gault, supra,* there was in fact evidence other than the indictment showing the relator's complicity in the crimes alleged in the indictment. The relator there proposed to show that the charge made against him and a large number of other persons, firms and corporations, of having violated the Sherman Anti-Trust Law, was groundless, and after having been permitted to introduce a quantity of "defensive" evidence sought to further develop his case by the submission of confirmatory proof. The petitioner in the case at bar conclusively established by the testimony of all of the persons admittedly implicated in the commission of the offense charged in the indictment, as well as by other proof, that he had *nothing* whatsoever to do with any of the things or matters charged in the indictment. *The competent evidence made him a stranger to the case rather than one who seeks to excuse himself for the commission of the acts constituting the charge against him.* The question is a pointed one. Shall the fact that the Commissioner gave "latitude" to a defendant in removal proceedings in the presentation of his proof be a bar to a review of the finding made by him even if there is no evidence sufficient to support the conclusion reached? And is it true that the decision of the Commissioner is "safe on habeas corpus" even if it finds support only in the indictment and there is an overwhelming amount of undisputed proof establishing conclusively that the defendant was not implicated in any manner in the commission of the offenses charged in the indictment? It is evident that nothing has been said by this Court authorizing the view that the Commissioner's decision must stand no matter how "flagrantly mistaken" or palpably unjust it may be.

It is respectfully submitted that the statement made in the opinion by Mr. Justice Holmes in the case of *United States ex rel. Hughes* v. *Gault, supra,* with respect to the informality of removal proceedings and the rules of evidence applicable thereto was *obiter dicta* inasmuch as the only question of evidence presented concerned itself with the dis-

cretion of the Commissioner in excluding certain confirmatory proof and that matter was not passed upon in the decision of this Court. It does not appear that it was intended to allow for the reception of hearsay and incompetent evidence such as that of the testimony of the witness Main.

In the light of the facts in the case at bar and under the authorities cited we submit that the Circuit Court of Appeals erred in limiting its jurisdiction to the purely formal determination of whether or not the Commissioner had heard the evidence. Essential and important it was to determine whether the Commissioner had reached a valid and legal conclusion. Otherwise to rule was to abdicate the powers of judicial review of the Commissioner's acts and to render nugatory all the safeguards theretofore erected in removal proceedings. The questions involved are of the utmost importance not only in the case at bar, but in all removal proceedings, and it is essential for this Court clearly to enunciate the applicable rules and to resolve the controversy which has arisen through the radical attitude adopted by the Circuit Court of Appeals for the Second Circuit.

II.

Admission of the testimony of Special Agent Main was prejudicial and contrary to law.

(Assignments of Error Nos. 8 to 11, R. 63-64.)

That the rebuttal testimony of Special Agent Main with respect to alleged inconsistent and contradictory statements made by witnesses for petitioner was incompetent is clear beyond question. *Larkin* v. *Nassau Electric R. R. Co.*, 205 N. Y. 267; *Ayers* v. *Watson*, 132 U. S. 394; *Mattox* v. *United States*, 156 U. S. 327; *Bennett* v. *Hoffman*, 289 Fed. 797, 799. His testimony was likewise incompetent to show bias, prejudice, hostility, interest or hope for reward on the part of said witnesses unless a proper foundation was laid therefor.

People v. *Mallon*, 116 App. Div. 425, affirmed 189 N. Y. 520; *Stacy* v. *Graham*, 14 N. Y. 492; *Taylor* v. *United States*, 89 Fed. 954, 956. This was conceded by the Circuit Court of Appeals which wrote:

> "The relator raises a second point. On rebuttal the prosecution called witnesses to impeach two of the accused's witnesses by imputing to them statements contradictory to their testimony on the stand. The ground had not been prepared for this evidence by asking the impeached witnesses on cross-examination whether they had not so contradicted themselves. That was indeed a condition and made the testimony in rebuttal incompetent, especially as the prosecution apparently already knew the contradictions at the time of the cross-examination. Wigmore §1025. Thus the commissioner considered evidence which strictly he should not have heard. Nevertheless we are not disposed to require him to reconsider his decision. There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in courts. *U. S.* v. *Greene*, 108 F. R. 816, 819, 820; *U. S.* v. *Kallas*, 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in *U. S. ex rel. Hughes* v. *Gault, supra* (271 U. S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradiction and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings."

Such reasoning is not tenable, either under the authorities or upon the facts of the case at bar. *Special Agent Main was present when the depositions of the witnesses for petitioner were taken. The contradiction was already known to him at that time. No effort was then made to cross-examine*

on this point, although cross-examination was both extensive and thorough.

There was no duty upon petitioner to obtain an explanation of an alleged contradiction under these circumstances. A year had elapsed between the time the depositions were taken and the date of Main's testimony. Nor was opportunity given to petitioner to obtain such explanation at that time. The Government pressed for final determination and contended the testimony was relevant and competent. In this the Commissioner concurred.

To say that the ordinary rules of evidence are inapplicable in removal proceedings is to disregard the well-established rule that such proceedings are in their very nature judicial and not ministerial. The Commissioner acts as an inferior judicial official rather than as a ministerial officer. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, and is controlled and guided by the commonly applied principles of legal evidence. He proceeds under Section 591 of Title 18, United States Code, according to the law of the state wherein he sits. *United States* v. *Morse,* 287 Fed. 906; *United States* v. *Beavers,* 125 Fed. 778. This necessarily includes the rules of evidence of that state.

In removal proceedings the Commissioner must act upon competent and legal evidence. *Cf. Greene* v. *Henkel,* 183 U. S. 249. His powers in this regard are analogous to those of referees and special masters in bankruptcy, to committing magistrates and to other officials whose acts and conduct are subject to judicial review. *People ex rel. Perkins* v. *Moss,* 187 N. Y. 110; *People* v. *Shenk,* 142 N. Y. Supp. 1081; *Moore* v. *Harvey,* 236 App. Div. 815, 260 N. Y. Supp. 142.

In *People ex rel. Perkins* v. *Moss, supra,* 187 N. Y. 410, the Court said:

> "If the information which was laid before the magistrate furnished no *legal evidence* of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime

charged had been committed, he was without jurisdiction to cause the arrest of the relator, and the latter was entitled to resort at once for his protection through a writ of habeas corpus."

In *United States* v. *Green*, 100 Fed. 941, it was held that under Section 591, the proceeding before a Commissioner for the commitment of a person so arrested, is the same as that prescribed by the laws of the State for proceedings before an examining magistrate; the only issue before the Commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged. The evidence admissible upon that issue is determined by the State practice.

In *People* v. *Shenk*, 142 N. Y. Supp. 1081, it was held that the *prima facie* case before the committing magistrate must be based upon legally competent evidence. Authorities holding for the proposition that the Magistrate's Court and the United States Commissioner must found their conclusions upon legally competent evidence may be multiplied *ad infinitum*. The Federal Courts are even more careful than the local Courts in the reception of only legally competent evidence upon a preliminary hearing. The fatal defect in the proof adduced through Special Agent Main is not founded upon technical considerations, but, on the contrary, rests upon extremely well-established principles of law which find support in common sense and sound logic and is ground for reversal.

Neither *United States* v. *Greene*, 108 Fed. 816, nor *United States* v. *Kallas*, 272 Fed. 742 (both of which District Court decisions were cited by the Circuit Court of Appeals) establish the principle that rules of evidence are inapplicable in a removal proceeding. In both cases stress was laid upon the necessity of resting a finding of probable cause upon *competent* evidence. Nor does the reasoning in *United States ex rel. Hughes* v. *Gault*, *supra*, 271 U. S. 142, require such a rule. This Court in that case did not specifically decide the point now involved and the remarks in the opinion concern-

ing hearings before laymen in removal proceedings were not intended to cover such a situation as is here presented. Most removal proceedings are instituted before United States Commissioners. All removal orders are signed by United States District Judges. This is a judicial act. It would be an unfortunate as well as illogical precedent which would sanction the presentation of incompetent and hearsay testimony in a removal proceeding so that the judicial duty of the District Judge to sign such removal order would necessarily have to be based upon *non-judicial* hearsay and incompetent evidence. The questions here presented are novel and have never been passed upon by this Court. They are meritorious ground for review.

CONCLUSION.

The evidence, including even the utterly incompetent testimony of Special Agent Main adduced in a belated and desperate effort to support the application for removal, properly evaluated, leaves no room to doubt that petitioner not only completely destroyed the initial, technical presumption of probable cause arising from the indictment and proof of identity, but overwhelmingly establish his innocence of any wrongdoing (compare the statement of Mr. Creel at R. 78). Counsel for the Government in the demanding jurisdiction as well as in the remanding jurisdiction must have known at all times of the availability of Special Agent Main's testimony. Main was present when the depositions were taken. The one and only explanation for the Government's failure to call Special Agent Main to the stand during the year and a half that the proceeding has been in progress was the conviction of counsel for the Government that the testimony of Special Agent Main was hearsay and incompetent.

What value in law can Special Agent Main's testimony as to what certain witnesses said to him out of court and not under oath, inconsistent with and contradictory of their sworn testimony, have against the cumulative weight of petitioner's uncontradicted statement establishing his innocence,

beyond peradventure of doubt, the testimony of his wife and character witnesses and the sworn depositions of five of the defendants named in the indictment attesting to petitioner's complete innocence?

It is respectfully submitted that to order the removal of petitioner upon the basis offered therefor by the Government is tantamount to annihilating the safeguards developed by the law against the injudicious removal of a person to a foreign jurisdiction and to unjustifiably subject him to all of the sufferings and hardships that such an order entails.

The order of the Circuit Court of Appeals for the Second Circuit and that of the District Court for the Southern District of New York should be reversed, the writs of habeas corpus and certiorari sustained and the petitioner discharged.

Respectfully submitted,

DAVID P. SIEGEL,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	9

CITATIONS

Cases:

Albury v. *Dyson*, 285 Fed. 738	5
Bonaventura v. *United States*, 55 F. (2d) 833	5
Collins v. *Loisel*, 259 U. S. 309	8
Crumpton v. *United States*, 138 U. S. 361	6
Dayton P. & L. Co. v. *Commissioner*, 292 U. S. 290	7
Fetters v. *United States*, 283 U. S. 638	8
Horner v. *United States. No. 1*, 143 U. S. 207	5
Hughes v. *Gault*, 271 U. S. 142	5, 6, 8
Hyde v. *Shine*, 199 U. S. 62	5, 6
Johnson v. *United States*, 157 U. S. 320	6
Royall, Ex parte, 117 U. S. 241	7
Smith v. *Whitney*, 116 U. S. 167	7
Vajtauer v. *Commissioner*, 273 U. S. 103	6, 8
Wood v. *Cooper*, 18 F. (2d) 535, certiorari denied, 274 U. S. 750	5

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA ON THE RELATION OF Arthur Kassin, petitioner

v.

HONORABLE RAYMOND J. MULLIGAN, UNITED STATES Marshal for the Southern District of New York, and Honorable Garrett W. Cotter, United States Commissioner for the Southern District of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Circuit Court of Appeals (R. 214–216) is reported in 73 F. (2d) 274; that of the District Court (R. 200) has not been reported.

JURISDICTION

The judgment sought to be reviewed was entered November 13, 1934 (R. 216). The petition for a

writ of certiorari was filed in this Court December 10, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was a sufficient showing of probable cause for the prosecution.

2. Whether the Circuit Court of Appeals on habeas corpus was bound to review the United States Commissioner's finding of probable cause for the purpose of determining its correctness.

3. Whether reversible error was committed by the Commissioner in receiving in evidence certain testimony of a special agent.

STATEMENT

An indictment was returned in the United States District Court for the Southern District of Florida charging the petitioner and others with, among other things, conspiring to misapply the funds of a National Bank in Jacksonville, Fla. (R. 19 *et seq.*). The petitioner was later apprehended in the Southern District of New York, and accorded a full hearing before a United States Commissioner for the purpose of determining whether he should be committed for removal to the trial district to answer the indictment (R. 54 *et seq.*). To establish probable cause the Government introduced a certified copy of the indictment which described the petitioner by his right name and by the alias of

Arthur Starke (R. 55, 77). Testimony was then introduced establishing that during the period the conspiracy was alleged to have been in operation the petitioner under his alias of Arthur Starke had rented a safe-deposit box at a bank in St. Augustine, Fla., and had also registered at a hotel at Jacksonville Beach, Fla. (R. 56-84). Both of these acts were charged in the conspiracy count of the indictment as overt acts 16 and 18 (R. 27). The Government further established a friendly relationship in Florida between the petitioner and one of his codefendants (R. 104). The petitioner offered his own testimony denying complicity in any of the offenses charged in the indictment, but admitting his presence in Florida, and the commission of the two overt acts, *supra*, under the alias of Arthur Starke (R. 91, 93, 95). He attempted to corroborate his testimony by the introduction of depositions of four codefendants who had been previously convicted and who undertook to declare that they did not know of petitioner having any part in the commission of the crimes charged (R. 116, 164, 175, 177). Cross-examination of these defendants showed, however, that at least three of them either did not know all of the members of the conspiracy or that it was possible for the petitioner to have participated therein without the knowledge of the particular defendant (R. 128, 172, 176). The Government then offered the testimony of a special agent to the effect that two of those whose deposi-

tions had been taken had made oral statements, both before and after the taking of the depositions, which contradicted these depositions (R. 150, 153–155, 157–158, 159–161).

As the result of the hearing, the Commissioner ordered petitioner committed for removal (R. 9, 15). The petitioner thereupon filed in the United States District Court for the Southern District of New York a petition for a writ of habeas corpus alleging illegal detention based upon a claim of an absence of any showing of probable cause (R. 2–11). The writ issued (R. 11) and a return was filed (R. 14–17). Following a hearing, the writ was ordered dismissed, the District Court finding, after a review of the evidence, that probable cause was shown (R. 200). On appeal that judgment was unanimously affirmed (R. 214–216).

ARGUMENT

I

The petitioner apparently does not deny that the Government made out a prima facie case for removal by offering in evidence a certified copy of the indictment from the demanding district and by proof of identity of petitioner as one of those named as a defendant in the indictment. He contends, however, that the evidence did not establish probable cause for believing him guilty of the crimes charged in the indictment. We submit that this contention is without merit.

The conspiracy count of the indictment (R. 22) charged that "in pursuance of said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof", certain overt acts were committed by the various defendants. The evidence shows conclusively that the petitioner committed two of the overt acts charged. These overt acts were committed within the jurisdiction of the demanding district at points readily accessible, through modern means of transportation, to the bank whose funds were to be misapplied. Coupled with this evidence was an admission by the petitioner that he committed the overt acts referred to. His attempted explanation of his presence in Florida at the time the conspiracy was under way was apparently not believed by the United States Commissioner, who heard his testimony and was in the best position to judge of his credibility. It is well settled that upon an appeal in a proceeding to prevent removal, it is not within the province of the appellate court to weigh the evidence, but merely to determine whether there was before the Commissioner any competent evidence to support his finding. *Hughes* v. *Gault,* 271 U. S. 142, 151; *Hyde* v. *Shine,* 199 U. S. 62, 84; *Horner* v. *United States. No. 1,* 143 U. S. 207, 215; *Bonaventura* v. *United States,* 55 F. (2d) 833, 834 (C. C. A. 9th); *Wood* v. *Cooper,* 18 F. (2d) 535, 538 (C. C. A. 8th), certiorari denied, 274 U. S. 750; *Albury* v. *Dyson,* 285 Fed. 738, 739 (C. C. A. 5th).

The competency of the evidence referred to is not attacked.

What the petitioner is really seeking is to have this Court review the evidence to determine whether it would reach a conclusion different from that reached by the Commissioner. This would require a weighing of the evidence, which this Court has held is not within its province even upon appeal taken in a criminal proceeding itself. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Johnson* v. *United States,* 157 U. S. 320, 326. *A fortiori* the evidence will not be weighed in a proceeding for habeas corpus. *Hyde* v. *Shine,* 199 U. S. 62, 84. Neither wrong decision nor the reception and consideration of incompetent evidence affords a basis for relief on habeas corpus. Cf. *Vajtauer* v. *Commissioner,* 273 U. S. 103. There must be an "entire lack of evidence" to support the Commissioner's finding of probable cause to warrant discharge. *Hyde* v. *Shine, supra,* p. 84. In view of the evidence recited above, it cannot be said that the Commissioner committed a "palpable injustice" in committing the petitioner for removal. *Hughes* v. *Gault, supra,* p. 150.

II

Petitioner also contends that the Circuit Court of Appeals erroneously restricted the scope of appellate review in a removal proceeding by refusing

in the present case to review the evidence for the purpose of determining whether his evidence overcame that adduced by the Government.

We do not believe that it is necessary in this case to pass upon the correctness of the reasoning of the Circuit Court of Appeals, for it has been repeatedly held by this Court that it is concerned with the correctness of the judgment below rather than the reasons given in support of such judgment. See *Ex parte Royall*, 117 U. S. 241, 250; *Smith* v. *Whitney*, 116 U. S. 167, 175; *Dayton P. & L. Co.* v. *Commission*, 292 U. S. 290, 298. A review of the evidence by the Circuit Court of Appeals would have established that there was, as was found by the District Court (R. 200), at least some competent evidence to support the Commissioner's finding of probable cause, which was all that was required. There is, therefore, in this case no basis for the assertion of a conflict of decisions based upon a difference of opinion in the Circuit Courts of Appeals as to the evidential effect of the indictment alone in a removal proceeding.[1]

III

No extended discussion is required of the petitioner's contention that the Commissioner erred in receiving in evidence the testimony of a special agent to the effect that several of the petitioner's

[1] See, however, in this connection *Fetters* v. *United States*, 283 U. S. 638, 641.

codefendants had orally contradicted certain statements they had made in the depositions used by the petitioner at the hearing. This contention seems to be based upon the premise that all the contradictory statements were made prior to the taking of the dispositions, but it should be pointed out that some of the contradictory statements were made after the depositions were taken. (*Supra*, pp. 3–4.) In any event, it is clear that no basis for relief on habeas corpus is afforded merely because incompetent evidence has been received and considered. *Vajtauer* v. *Commissioner*, 273 U. S. 103, *supra*. *Cf. Collins* v. *Loisel*, 259 U. S. 309, 314–315. While it may well be argued that the challenged testimony was competent under such decisions as *Hughes* v. *Gault*, *supra*, and *Fetters* v. *United States*, 283 U. S. 638, 642, *supra*, we submit that even though this testimony be eliminated, there remained sufficient competent evidence to support the finding of the Commissioner. Under any view no "palpable injustice" was committed by the Commissioner. *Hughes* v. *Gault*, *supra*.

In conclusion it may be stated that, as we see it, the petitioner has presented no stronger case against removal than did his codefendant Jerihem Seeman, whose petition for writ of certiorari was denied by this Court at the last term (292 U. S. 654).

CONCLUSION

The petitioner presents no question requiring review on writ of certiorari. We therefore respectfully submit that the petition should be denied.

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JANUARY 1935.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument:	
I. The Commissioner's finding of probable cause was not arbitrary or capricious and, therefore, should be upheld	12
II. The error, if any, in the admission by the Commissioner of the testimony of Special Agent Main does not entitle the petitioner to his discharge on habeas corpus	41
Conclusion	45
Appendix:	
A (Statutes involved)	46
B (Summary of Testimony)	49

CITATIONS

Cases:	
Ayres v. *Watson*, 132 U. S. 394	43
Beavers v. *Haubert*, 198 U. S. 77	30
Beavers v. *Henkel*, 194 U. S. 73	23
Benson v. *Henkel*, 198 U. S. 1	30
Benson v. *Palmer*, 31 App. D. C. 561	30
Booth v. *United States*, 57 F. (2d) 192	36
Burton v. *Smithers*, 31 F. (2d) 966	30
Coates v. *United States*, 59 F. (2d) 173	36
Collins v. *Loisel*, 259 U. S. 309	30, 45
Ex parte Foo Guey, 53 F. (2d) 207	40
Ex parte United States, 287 U. S. 241	23
Fetters v. *United States*, 283 U. S. 638	23, 25, 28
Frohwerk v. *United States*, 249 U. S. 204	36
Greene v. *Henkel*, 183 U. S. 249	30
Grigg v. *Bolton*, 53 F. (2d) 158	40
Haas v. *Henkel*, 216 U. S. 462	30
Henry v. *Henkel*, 235 U. S. 219	30
Hitchman Coal and Coke Co. v. *Mitchell*, 245 U. S. 229	36
Hughes v. *Gault*, 271 U. S. 142	19-22, 28, 43, 45
Hyde v. *Shine*, 199 U. S. 62	27, 28
In re Cravens, 40 F. (2d) 931	27
Jezewski v. *United States*, 13 F. (2d) 599, certiorari denied, 273 U. S. 735	36

Cases—Continued. Page

Johnson v. *Hotchkiss*, 35 F. (2d) 914 ..... 37, 39, 40
Lefkowitz v. *Schneider*, 51 F. (2d) 685 32
Magnus v. *Keville*, 6 F. (2d) 157 26
Mattox v. *United States*, 156 U. S. 237 43
McDonnell v. *United States*, 19 F. (2d) 801 36
Meehan v. *United States*, 11 F. (2d) 847 ..... 37, 39, 40
Mendelson v. *United States*, 58 F. (2d) 532 36
Morse v. *United States*, 267 U. S. 80 24
Peckham v. *Henkel*, 216 U. S. 483 30
Pierce v. *United States*, 252 U. S. 239 36
Price v. *Henkel*, 216 U. S. 488 ..... 27, 29
Rumely v. *McCarthy*, 250 U. S. 283 30
Rodman v. *Pothier*, 264 U. S. 399 30
South Carolina v. *Bailey*, 289 U. S. 412 31
Steeves v. *Rodman*, 12 F. (2d) 915 30
Tinsley v. *Treat*, 205 U. S. 20 25
United States v. *Andrade*, 10 F. (2d) 572 40
United States v. *Fogel*, 22 F. (2d) 823 31
United States v. *Fogel*, 22 F. (2d) 826 31
United States v. *Greene*, 108 Fed. 816 44
United States v. *Kallas*, 272 Fed. 742 45
United States v. *Wood*, 26 F. (2d) 908 30
United States ex rel. Haim v. *Mathues*, 19 F. (2d) 22 30
United States ex rel. Jerihem Seeman v. *Mulligan*, 69 F. (2d) 1022, certiorari denied, No. 1023 last term; 292 U. S. 654 ..... 9, 34
United States ex rel. Louis v. *Laubenheimer*, 71 F. (2d) 814 30
United States ex rel. Maggio v. *Schneider*, 68 F. (2d) 50 ..... 30, 34
United States ex rel. Scharlon v. *Pulver*, 54 F. (2d) 261 ..... 10, 15
Vajtauer v. *Commissioner of Immigration*, 273 U. S. 103 45
Wilson v. *United States*, 232 U. S. 563 36
Wood v. *Cooper*, 18 F. (2d) 535 30
Zottarelli v. *United States*, 20 F. (2d) 795, certiorari denied, 275 U. S. 571 36

Statutes:

Revised Statutes:
Sec. 1014 (U. S. C., Title 18, Sec. 591) 46
Sec. 5209, as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C., Title 12, Sec. 592) 46

Criminal Code:
Sec. 37 (U. S. C., Title 18, Sec. 88) 48

Miscellaneous:

Hardy on Removal of Federal Offenders, p. 78 31
Jones Commentaries on Evidence, 2d Ed., Vol. 6, Sec. 2042 43
Wigmore on Evidence, Vol. 2, 2d Ed., Sec. 1030 43

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 569

UNITED STATES OF AMERICA ON THE RELATION OF Arthur Kassin, petitioner

v.

RAYMOND J. MULLIGAN, UNITED STATES MARSHAL for the Southern District of New York, and Garrett W. Cotter, United States Commissioner for the Southern District of New York

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT, RAYMOND J. MULLIGAN, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK[1]

OPINIONS BELOW

The memorandum opinion of the District Court (R. 158–159) has not been reported. The per curiam opinion of the Circuit Court of Appeals (R. 166–168) is reported in 73 F. (2d) 274.

[1] The only relief prayed against the United States Commissioner was that a writ of certiorari be issued directing him to certify to the District Court the indictment, testi-

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1934 (R. 168–169). The petition for a writ of certiorari was filed in this Court December 10, 1934, and granted on January 14, 1935 (R. 169). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Where a United States Commissioner has found in a removal proceeding that there was probable cause to believe the defendant guilty of the offense or offenses charged in the indictment and has ordered his commitment for removal, whether in an appeal taken in a habeas corpus proceeding to prevent removal a Circuit Court of Appeals is required to weigh the evidence before the Commissioner for the purpose of determining whether it would reach a different result, the defendant not having established by unimpeachable testimony that the decision of the Commissioner was arbitrary or capricious.

(2) Whether, if the evidence may be weighed, there was a sufficient showing of probable cause in the instant case.

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mony, etc., upon which he acted in directing that the petitioner be committed for removal (R. 7). The writ issued (R. 8–9), and the United States Commissioner complied with its requirements in his return (R. 12). He has, therefore, no further interest in the proceeding, and consequently no brief is necessary on his behalf.

(3) Whether the Commissioner committed such error in receiving and considering the rebuttal testimony of Special Agent Main as entitles the petitioner to his discharge on *habeas corpus*.

STATUTES INVOLVED

The pertinent statutory provisions are copied in Appendix A, *infra* (pp. 46–48).

STATEMENT

An indictment in 18 counts was returned against the petitioner and others in the District Court of the United States for the Southern District of Florida on January 28, 1933 (R. 13–37). The first count of the indictment (R. 13–15) charged that one Julius L. Chadwick, an employee of the Florida National Bank of Jacksonville, Florida, which was a member bank of the Federal Reserve system, conspired with the petitioner and the other defendants continuously from November 1, 1931, to May 13, 1932, to misapply the bank's funds by converting to the use of the defendants the moneys, funds, and credits of the bank by means of forged checks to the amount of $131,426.00, drawn upon the account of a depositor in the bank, in violation of R. S. § 5209, as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C., Title 12, § 592; Appendix A, *infra* (pp. 46–48). This count alleged (R. 15) that "in pursuance of said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the pur-

pose of effecting and accomplishing the object thereof", the defendants committed various overt acts, among which were the following performed by the petitioner (R. 18):

> 15. On, to wit, the 1st day of April, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, proceeded to Jacksonville, Florida, and registered at the George Washington Hotel, Jacksonville, Florida, under the name of Arthur Stern, Philadelphia, Penna.
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> 16. On, to wit, the 24th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Casa Marina Hotel, Jacksonville Beach, Florida, under the name of Arthur Starke, Washington, D. C.
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> 17. On, to wit, the 27th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, registered at the Monson Hotel, St. Augustine, Florida, as Arthur Starke, Washington, D. C.
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> 18. On, to wit, the 30th day of April, 1932, the defendant Archie Kassin, alias Archie Kassen, alias Arthur Kassin, alias Arthur Stern, alias Arthur Starke, alias Archie Stone, alias Harry Stern, under the name of Arthur Starke, rented a safe deposit box at

the St. Augustine National Bank, St. Augustine, Florida.

The other counts of the indictment charged Chadwick with misapplying the funds of the bank and with making certain false entries in statements and books of the bank, in violation of R. S., § 5209, as amended. The petitioner and the other defendants were charged as aiders and abetters in the commission of these offenses (R. 19–37).

On April 4, 1933, the petitioner was taken into custody in the Southern District of New York and arraigned before a United States Commissioner on a complaint filed by a Special Agent of the Department of Justice, alleging that the petitioner was one of the defendants named in the above indictment and praying that an order be entered directing the removal of the petitioner to the Southern District of Florida (R. 2). Petitioner was enlarged upon bail pending determination of the removal proceeding (R. 2), and five hearings were held before the United States Commissioner between May 16, 1933, and June 19, 1934 (R. 37, 57, 66, 68, 87).

To establish probable cause the Government introduced a certified copy of the indictment and the testimony of two witnesses, MacDonnell [2] and Zapf, who proved that the petitioner had committed overt acts Nos. 16 and 18 charged in the conspiracy

[2] MacDonnell had testified before the grand jury and identified the petitioner as the person against whom he testified (R. 39–42, 56).

count of the indictment, i. e., that on April 24, 1932, the petitioner had registered at a hotel at Jacksonville Beach, Florida, under an alias, and that on April 30, 1932, he rented a safe deposit box under an alias in a bank in St. Augustine, Florida (which was opened by him several times).

To controvert the Government's showing, the petitioner took the stand. He admitted his presence in Florida and that he had registered at the Jacksonville Beach hotel and rented a safe deposit box at the St. Augustine National Bank as charged, but attempted to explain these matters. He also attempted to explain his use of an alias while in Florida, but this explanation was unintelligible. In addition to his own testimony and that of his wife offered in corroboration, the petitioner introduced the depositions of five witnesses who were then undergoing sentence under the instant and other indictments for their part in the misapplication of the funds of the Florida National Bank. These witnesses attempted to exonerate the petitioner of the offenses charged, but their testimony revealed either that they did not know all the participants, that transactions could have been had by other participants with the petitioner without their knowledge, or that while they were willing to aid the petitioner they were loath to give any details by which the credibility of their testimony could be gaged.

To rebut this testimony the Government recalled the witness MacDonnell, who testified that on one occasion he saw the petitioner enter the St. Au-

gustine National Bank in the company of one Goldberg, whose participation in the conspiracy charged is indisputable. Both the petitioner and Goldberg had safe deposit boxes at the bank, but petitioner denied any acquaintance with Goldberg. In addition the Government placed on the stand Roger L. Main, a Special Agent of the Department of Justice, who had investigated the case. He stated that two of those whose depositions were offered in favor of the petitioner (Dickson and David N. Chadwick) had made contradictory statements to him prior to their depositions and that after they had made these depositions they told him in effect that they had lied therein. Without going into detail it suffices to say that these statements not only implicated petitioner in the conspiracy, but that one of them disclosed him as the prime mover therein. Main's testimony was objected to on the ground that proper foundation had not been laid for its admission. We have not attempted at this point to give anything more than a synopsis of the testimony, but we have for the convenience of the Court summarized it adequately in Appendix B, *infra* pp. 49–65, to which reference will from time to time be made.

After hearing the testimony and after giving each side opportunity to submit briefs (R. 128), the Commissioner made the following findings (R. 12):

> from the above-mentioned testimony and exhibits I found the petitioner was the identical person mentioned in the indict-

> ment. I found further that there was probable cause to believe that he committed the offense with which he is charged. I further found that the indictment charged an offense against the United States and that the Court of the District to which removal was sought has jurisdiction to try the petitioner for the offense charged.

Accordingly, on June 25, 1934, he ordered the petitioner committed to the custody of the United States Marshal for removal to the Southern District of Florida (R. 10–11).

On June 29, 1934, the petitioner filed in the District Court of the United States for the Southern District of New York a petition denying that the Government had shown probable cause to believe that he was guilty of the offenses charged in the indictment and alleging that his removal to the Southern District of Florida would, therefore, be unwarranted. This petition also alleged that the testimony of Special Agent Main was incompetent and prejudicial and was elicited in violation of his constitutional rights. The petition prayed that a writ of habeas corpus be issued, directed to the Marshal, and that a writ of certiorari be issued, directed to the United States Commissioner (R. 1–7). These two writs issued (R. 8–9) and returns were filed by the Marshal and Commissioner (R. 10–12).

No additional testimony was taken in the District Court upon the question of probable cause. In that court the Government contended that the is-

sues presented were raised on the same evidence as in the recent case of *Jerihem Seeman*, jointly indicted with petitioner, in which case the court had decided that the removal was proper.[1]

The court stated, however, that a comparison of the records in the two cases showed a substantial distinction; that in the *Seeman* case the court refused to accept and consider depositions secured from certain other defendants jointly indicted, whereas in the instant case these depositions were not only considered by the Commissioner, but subsequent thereto the Government was permitted to call as a witness Special Agent Main, who testified to conflicting statements made by two of the witnesses before and after the depositions were taken. After stating that the propriety of the reception of Main's testimony had been challenged and that the court had for that reason "reviewed the evidence in detail," the court said (R. 159):

> While I do not believe that the Commissioner is held to the same rigid rule as would be applicable upon the trial of the indictment (*Hughes* v. *Gault*, 271 U. S. 142), the evidence in this case satisfies me that the Commissioner would have been amply justified in making the order of removal even

[1] In the *Seeman case* the decision of the District Court was affirmed *per curiam* without opinion by the Circuit Court of Appeals for the Second Circuit (69 F. (2d) 1022), and on June 4, 1934, this Court denied a petition for writ of certiorari (No. 1023, last term; 292 U. S. 654).

had he not admitted, or disregarded, the testimony of the witness Main.

The court accordingly ordered that the writ of habeas corpus be dismissed and the petitioner remanded to the custody of the Marshal (R. 159–160).

On appeal (R. 160–164) the Circuit Court of Appeals for the Second Circuit unanimously affirmed the order below. As we interpret that opinion the court held that as the Commissioner had received and considered all the relevant evidence which the accused had introduced, it was not required on an appeal in a habeas corpus proceeding to prevent removal to review the evidence for the purpose of determining whether it would reach a different conclusion; that it could only interfere if the indictment appeared "so overwhelmingly unjustified as to show that thongh the Commissioner has pretended to hear the defence, he has not really done so" (R. 166–167). By reference to its prior decision in *United States ex rel. Scharlon* v. *Pulver*, 54 F. (2d) 261, it is evident that the arbitrary action of a Commissioner to which the court had reference comprehended a situation where the Commissioner ordered commitment for removal in the face of incontrovertible testimony showing that it was impossible for the accused to have committed the offense charged. An instance of such arbitrary action was given by the court in the *Scharlon* case as follows (p. 264):

> * * * Suppose for example that he [the accused] could prove by unimpeachable

> contemporaneous documents that at the time charged he was physically incapable of committing the crime, as for example, that he was in a hospital recovering from an operation. No commissioner who rationally considered such evidence at all, could fail to discharge him. True, on review we should be passing on the cogency of the proof; not however to decide merely that there was no evidence of probable cause, but that the accused had been denied a rational hearing. * * *

Concerning the admissibility of Special Agent Main's testimony, the court made no reference to the contradictory statements of Dickson and Chadwick which were made *after* their depositions were taken. As the court said (R. 167) that "as the prosecution apparently already knew the contradictions at the time of the cross-examination" of these witnesses by the Government when their depositions were taken, it evidently had in mind only the contradictory statements made by Chadwick and Dickson before their depositions were taken. The court held that because Dickson and Chadwick were not asked during their cross-examination by the Government whether they had made contradictory statements, the ground had not been prepared for the admission of this testimony and that it was therefore incompetent. It said, however, that while the Commissioner had thus considered evidence which strictly he should not have heard, it

was not disposed to require him to reconsider his decision for the following reasons (R. 167–168):

> * * * There is some authority for saying that in such proceedings the rules of evidence are slacker than in trials in court. *U. S.* v. *Green,* 108 F. R. 816, 819, 820; *U. S.* v. *Kallas,* 272 Fed. Rep. 742, 749. And this is confirmed by the reasoning in *U. S. ex rel. Hughes* v. *Gault, supra* (271 U. S. 142), that as the statute includes hearings before laymen, it cannot aim at more than informal justice, certainly not in full panoply of the common law. We are satisfied that it does not. In any case the error here did not go to the very substance of the matter. Although it is true that the impeached witnesses' own version may soften the starkness of the contradiction and leave their credit unimpaired, or less impaired, there is no inherent reason, except convenience, why they should not make their explanation after the contradictions are received. The relator here made no such suggestion, but rested upon the error of law. That was not grave enough to upset the whole proceedings.

ARGUMENT

I

THE COMMISSIONER'S FINDING OF PROBABLE CAUSE WAS NOT ARBITRARY OR CAPRICIOUS AND, THEREFORE, SHOULD BE UPHELD

There is no question presented here as to the sufficiency of the indictment to charge an offense within the jurisdiction of the court of the demand-

ing district, or as to the identity of the petitioner as one of those named as a defendant in the indictment. The only question involved is whether the Government's showing of probable cause was sufficient on habeas corpus to uphold the action of the Commissioner in committing the petitioner for removal.

The position of the petitioner apparently is that the Government introduced no evidence having any probative value with reference to probable cause except the indictment, and that the effect of that as evidence of probable cause was swept away by the evidence introduced by the petitioner and his witnesses to show innocence. While we disagree with the petitioner's appraisal of the weight of the evidence for and against probable cause, the court below did not find it necessary, correctly, we think, to attempt to weigh the evidence because of its conception of the scope of its review in a proceeding such as that before it. It said (R. 166–167):

> * * * We are now asked, after the district judge has refused to do so, to go over the evidence ourselves and reach a contrary result. The first question is of the scope of our review, and with it we can stop. It is of course true that the indictment is not conclusive evidence on the issue of probable cause, *Tinsley* v. *Treat*, 205 U. S. 20. The commissioner is bound to receive and consider all relevant evidence which the accused chooses to bring in; and no doubt his judgment must be his own, based upon all the evidence before him, though the indictment

> is necessarily hearsay. But we decided, after as careful consideration as we could give it, in *U. S. ex rel. Scharlon* v. *Pulver*, 54 Fed. (2d) 261, that our review of his decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further. To be sure that issue is not necessarily measured by the formal reception of all that the accused offers; we did not commit ourselves to the sufficiency of a mere ritual. The indictment may appear so overwhelmingly unjustified as to show that though the commissioner has pretended to hear the defence, he has not really done so. Such cases will be very rare; this is certainly not one. We have several times since disposed of similar appeals by reference to that decision. *U. S. ex rel. Kohl* v. *Mulligan*, 54 Fed. (2) 1085; *U. S. ex rel. Pugliese* v. *Pulver*, 61 Fed. (2) 1044; *U. S. ex rel. Frank* v. *Mulligan*, 66 Fed. (2) 562. But the bar does not seem to understand that, regardless of what may be the doctrine elsewhere, we will go no further until the Supreme Court admonishes us that we have misread *U. S. ex rel. Hughes* v. *Gault*, 271 U. S. 142. Such appeals are therefore ordinarily fruitless.

This statement is but an epitome of the views of the court so carefully expressed in its previous decision in the *Scharlon case*. In the opinion in that case the opposing viewpoints with respect to the scope of review on habeas corpus to prevent

removal are, we think, so admirably stated as to justify extensive quotation therefrom. After stating the facts in the case, the court said (pp. 263–264):

> There is unquestionably much confusion in the books as to what is open for review upon such proceedings. While it is uniformly held that the indictment makes a prima facie case, what that means is not always clear. It may be no more than to establish a legal presumption of probable cause; on the other hand, it may itself constitute evidence of that fact. Very different consequences follow from these two views, pursued to their conclusions. A true presumption is not evidence, though it supplies its place and requires the other party to proceed with the negative. Unless he does, he loses; when he does, the presumption is out of the case, and the issue is open. On this view, therefore, as soon as the accused puts in any proof, except possibly a bare denial—the equivalent of a plea of not guilty—the indictment disappears, the prosecution must proceed with evidence of probable cause, and the commissioner must decide only between the evidence in denial and the rebuttal. This we understand to be the doctrine laid down in *Meehan* v. *U. S.*, 11 F. (2d) 847 (C. C. A. 6), and *Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9).
>
> The other view results practically in circumscribing the writ to an examination of the regularity of the proceeding; that is,

as to whether the commissioner allowed the accused proper latitude in presenting his case, and really considered his proof. If he has done so, his conclusion as to the existence of probable cause is irreviewable, and the evidence in rebuttal is never important except insofar as he might without it have found the evidence of the accused persuasive. If the prosecution chooses to take the chance that the indictment alone will satisfy him, it will always be safe on habeas corpus. Perhaps the judge who orders the removal may think otherwise, but that is a different question. All this necessarily follows from the well-settled rule that in such cases—which are only a species of habeas corpus in general—the writ does not search the correctness of the conclusion as matter of fact. It only examines whether there was any evidence which could justify the finding of probable cause. *Oteiza* v. *Jacobus,* 136 U. S. 330, 10 S. Ct. 1031, 34 L. Ed. 464; *Bryant* v. *U. S.,* 167 U. S. 104, 17 S. Ct. 744, 42 L. Ed. 94; *Hyde* v. *Shine,* 199 U. S. 62, 84, 25 S. Ct. 760, 50 L. Ed. 90; *Price* v. *Henkel,* 216 U. S. 488, 30 S. Ct. 257, 54 L. Ed. 581; *Rodman* v. *Pothier,* 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759; *United States ex rel. Hughes* v. *Gault,* 271 U. S. 142, 46 S. Ct. 459, 70 L. Ed. 875. Once it be conceded that the indictment is itself evidence, the testimony of the accused can meet it only as proof against proof, and it will be alone enough to support the finding. The

rebuttal is only cumulative, and it is never necessary to consider it upon habeas corpus.

As there is no middle ground, except as we shall try to show later, we must choose between these two. Any decision would test the question which supported a removal, where at once the accused put in more than formal evidence in denial, and the prosecution proved nothing in rebuttal, for such a ruling is obviously inconsistent with the notion that the indictment is only a presumption. There are a number of cases, where, so far as appears, both conditions existed. *Beavers* v. *Haubert*, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950; *Hyde* v. *Shine*, 199 U. S. 62, 84, 25 S. Ct. 760, 50 L. Ed. 90; *Price* v. *Henkel*, 216 U. S. 488, 30 S. Ct. 257, 54 L. Ed. 581; *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142, 46 S. Ct. 459, 70 L. Ed. 875; *Magnus* v. *Keville*, 6 F. (2d) 157 (C. C. A. 1); *Burton* v. *Smithers*, 31 F. (2d) 966 (C. C. A. 4). None of these was correctly decided if the first doctrine be law. We think that it is not. Yet in several of the opinions the court discussed the effect of the accused's evidence, permitting the inference that he might present a case so strong as to upset the commissioner's finding. Indeed, just this was the result in *United States ex rel. Mayer* v. *Glass*, 25 F. (2d) 941 (C. C. A. 3), though Judge Buffington dissented, perhaps with reason. There is, however, a reconcilement between the possibility in extreme cases of examining the evidence, and the estab-

lished limitations upon the writ; and while it is somewhat refined, it is not casuistical. The accused is entitled to a real consideration of his proof, and can secure it even on habeas corpus. Suppose for example that he could prove by unimpeachable contemporaneous documents that at the time charged he was physically incapable of committing the crime, as for example, that he was in a hospital recovering from an operation. No commissioner who rationally considered such evidence at all, could fail to discharge him. True, on review we should be passing on the cogency of the proof; not however to decide merely that there was no evidence of probable cause, but that the accused had been denied a rational hearing. The two issues no doubt merge in practice, and this may make the decision embarrassing, but it ought not to deprive the accused of his rights. Perhaps in the end this is no more than saying that there may be cases so flagrant that logic must yield; and in any case we need only concede arguendo that that is a possibility. The evidence of the relators was far from demonstrating that the indictment could not be true, or that the commissioner could not have given the relators' proofs an honest and understanding consideration. This is true, even though we disregard the rebuttal, whatever its actual contribution to the result.

We hold therefore that when the accused has had full opportunity to put in his proof and it has been actually considered, he can get no relief on habeas corpus. *Tinsley* v.

Treat, 205 U. S. 20, 27 S. Ct. 430, 51 L. Ed. 689, is not to the contrary; it merely held that he was entitled to his day in court, that is, to a decision based upon the evidence he might present; it had nothing to do with the review of a decision so made. Our decision in *United States ex rel. Brody* v. *Hecht*, 11 F. (2d) 128, was in quite another situation, where, although the accused did not testify, the prosecution supplemented the indictment with evidence which showed that no crime had been committed within the jurisdiction of the court where the indictment was lodged. * * *

The view that a Commissioner's finding of probable cause is not to be interfered with on habeas corpus, unless the accused has demonstrated beyond cavil that this finding is arbitrary or capricious because it is in the teeth of incontrovertible and unimpeachable evidence of innocence, finds clear support in the reasoning employed by this and other courts in numerous decisions.

It must be remembered that the right accorded a defendant to contest removal is not a right conferred by the Constitution. As was said by this Court in *Hughes* v. *Gault*, 271 U. S. 142, 149:

> The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by

> his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime. In *Tinsley* v. *Treat*, 205 U. S. 20, 33, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied "a right secured by statute under the Constitution."[4]

The Court then proceeded to state that because the hardship of removal has grown with the growth of the United States, there has been a natural desire to prevent such hardship when possible, "if a preliminary sifting will show that there is no probable cause for the charge." In consequence R. S. 1014 (*infra*, p. 46) was enacted, which "might have been interpreted as contemplating a summary order without other hearing than was necessary, when there was an indictment, to show that fact and that the person present was the person charged." After pointing out that it had been held that the District Judge on an application to remove acts judicially and that probable cause must be shown, the Court significantly stated as follows:

> * * * It is to be noticed, however, that "where any offender * * * is committed in any district other than that where the offense is to be tried, it shall be the duty

[4] See also page 152.

of the judge of the district where such offender * * * is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal", etc. But the commitment, supposed by these words already to have taken place, is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any "mayor of a city, justice of the peace, or other magistrate, of any State where he may be found." Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding *palpable* injustice. He is not intended to hold a preliminary trial, and, if probable cause is shown on the government side, he is not to set it aside because on the other evidence he believes the defendant innocent. The rule that would apply to a mayor applies to a commissioner of the United States (p. 150). (Italics ours.)

The Court, moreover, said (pp. 151–152):

It is pointed out in *Beavers* v. *Henkel*, 194 U. S. 73, 83, that there are much stronger reasons for caution in surrendering an alleged criminal to a foreign nation than are required before removing a citizen from one place to another within the jurisdiction, yet

> in the latest case on extradition it is said that "*habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extention, whether there was *any* evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez* v. *Phillips,* 268 U. S. 311, 312. So far as the attack upon the order of removal is by *habeas corpus* this would seem to apply. *Price* v. *Henkel,* 216 U. S. 488, 492. (Italics ours.)

In the *Gault case* the relator and his company had been indicted under the Sherman Act and the relator testified before the Commissioner that he and his company were innocent. The Commissioner refused to hear certain confirmatory testimony, but the order of removal was upheld, the Court saying (p. 151):

> * * * On a summary proceeding like this, even if the exclusion was wrong, it would not be enough to invalidate the order of removal, as the Commissioner indicated by his finding that he thought there were substantial grounds for the charge of guilt and that it was not for him to decide whether they were met by the denials of the defendant, even if they seemed convincing. *Collins* v. *Loisel,* 259 U. S. 309, 314, 315.

So far as the opinion in the *Gault case* discloses, no evidence of probable cause was offered by the Government except the indictment.

In *Beavers* v. *Henkel*, 194 U. S. 73, it was contended that in the absence of statutory authority an indictment should not be considered as evidence outside the jurisdiction in which returned (pp. 75–76), but this Court pointed out, quoting from Blackstone, that the presumption is that an indictment has been returned only after the grand jury has found that there was probable cause to believe the defendant guilty of the offense charged and that it should consequently "be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause."[5] That this Court was of the view that it was only in exceptional cases at least that the showing of probable cause implicit in the returning of the indictment by the grand jury, should not be regarded as sufficient is evident from the following language which it used (pp. 84–85):

> The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. [The Court was here referring to the returning of indictment by the grand jury.]

[5] This does not mean, of course, that when the accused is placed on trial in the district in which the indictment was returned, the indictment is there to be considered as evidence. The Court was obviously speaking only of the effect of the indictment as evidence in the preliminary proceedings to bring the accused to trial. See *Fetters* v. *United States*, 283 U. S. 638, 643; *Ex parte United States*, 287 U. S. 241, 250.

> But the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere through the United States as at least prima facie evidence of the existence of probable cause. And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had.

With reference to the evidentiary character of the indictment when presented in a removal proceeding, this Court in *Morse* v. *United States*, 267 U. S. 80, 83, said:

> • • • The indictment was before the commissioner simply as evidence for the purpose of establishing or tending to establish the commission of an offense; and the commissioner had authority to pass upon its effect in that aspect only. The court reviewing the action of the commissioner under § 1014 upon *habeas corpus* was gov-

> erned by the same rules and its decision was subject to the same limitation. *Henry* v. *Henkel*, 235 U. S. 219, 230; *Benson* v. *Palmer*, 31 App. D. C. 561, 564–565. Neither had authority to determine the sufficiency of the indictment as a pleading. * * *

See also *Fetters* v. *United States*, 283 U. S. 638, 641, 642.

It is true that in *Tinsley* v. *Treat*, 205 U. S. 20, this Court held that an indictment was not conclusive evidence of probable cause in a removal proceeding and that the defendant was entitled to introduce evidence tending to show that no offense triable in the district to which his removal is sought had been committed, but this is far from saying that if after considering such evidence, the Commissioner and the District Judge upon application for removal should nevertheless find probable cause, this finding may be overturned, except in the extraordinary cases to which the court below referred, merely because another judge on *habeas corpus* or a Circuit Court of Appeals upon an appeal taken in such a proceeding should think from the evidence that a different conclusion should have been reached. That this Court never intended any such result to flow from its decision in the *Tinsley* case is apparent from its concluding remarks in that opinion. The Court said (p. 32):

> Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District

> Judge had thereupon determined that probable cause existed, and such determination could not be revised on *habeas corpus,* it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. * * *

Neither does the *Tinsley* decision, we submit, lend any weight to the view entertained in the decisions relied upon by the petitioner that the indictment vanishes from the case as soon as the defendant introduces evidence tending to show innocence and is thereafter not to be considered by the Commissioner and the District Judge as part of the evidence in determining whether there is probable cause. As was said in *Magnus* v. *Keville,* 6 F. (2d) 157, 158 (C. C. A. 1st).

> While an indictment is not strictly legal evidence of the facts therein charged, nevertheless, in removal proceedings, under section 1014 of the Revised Statutes (Comp. St. § 1674), by custom and long-continued usage it has been treated and held to be evidence of those facts warranting a finding of probable cause if it properly charged a crime against the United States committed within the district to which removal was sought, and the identity of the person charged with crime was shown.

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* The Court is here referring to the judgment of the District Court in the removal proceeding. The application for removal was filed before a District Judge and the *habeas corpus* proceeding was instituted in a Circuit Court.

> In *Hastings* v. *Murchie*, 219 F. 83, 134 C. C. A. 1, the only evidence introduced by the government was that of identity and the indictment found in the district to which removal was sought. There the petitioner had been denied the right to introduce evidence before the commissioner to show that he was not guilty of the offense charged and that there was no probable cause for believing him guilty. In that state of the case we held "there was evidence from which the commissioner could find probable cause for the commitment and detention of the appellant", and said: "Whether this evidence would have been overcome, had the appellant been permitted to introduce the evidence which he offered before the commissioner is entirely problematical; but if he is afforded an opportunity to present the evidence, either before the commissioner or before the District Judge on application for removal, his rights will be fully preserved." *It is evident we there regarded the indictment as evidence of probable cause and not merely as affording a presumption which would disappear as soon as countervailing evidence was offered.* (Italics ours.)

See also quotations from *Hyde* v. *Shine*, 199 U. S. 62, *Price* v. *Henkel*, 216 U. S. 488 at p. 29, *infra*, and discussion of the question in *In re Cravens*, 40 F. (2d) 931, 933–934 (W. D. Mo.).

All that the *Tinsley* case decided, in our view, was that the defendant was entitled to his day in

court in the removal proceeding, i. e., as the court below said, "to a decision based upon the evidence he might present", but if the Commissioner and the District Judge, after considering such evidence, should still find that there is probable cause, we know of no decision by this Court which lends any weight to the view that the accused is entitled on *habeas corpus* to another appraisal of the weight of the evidence. In the *habeas corpus* proceeding the inquiry is simply, as stated in *Hughes* v. *Gault, supra,* whether the finding is "palpably" unjust. Such questions as the guilt or innocence of the defendant or the technical sufficiency of the indictment, if it states a crime, no matter how inartificially, are matters peculiarly for the determination of the demanding court. The *habeas corpus* forum is no place for the solution of such questions. As was said by this Court in the recent case of *Fetters* v. *United States,* 283 U. S. 638, 641–642:

> • • • Doubtful questions of law relating to the sufficiency of the indictment or the validity of the statute upon which the indictment is based, as well as all doubtful questions of fact, are matters to be left for the trial court to determine. *Parker* v. *United States,* 3 F. (2d) 903, 904, and cases cited.

In *Hyde* v. *Shine,* 199 U. S. 62, 84, this Court, in speaking of the scope of review on *habeas corpus* to prevent removal said:

> In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there

> is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the Commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause. *In Re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. * * *[1]

In *Price* v. *Henkel*, 216 U. S. 488, 492, 493, this Court relying upon the rule stated in *Hyde* v. *Shine*, said:

> The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the com-

[1] In this case the contention was made that, pursuant to the requirement of Section 1014 R. S. that proceedings for removal of persons from one district to another shall be "agreeably to the usual mode of process against offenders in [the] State" where the accused is found, the California practice was applicable and that in such State the prisoner had the right to have the court on *habeas corpus* pass upon the weight of the evidence as to probable cause. This Court held, however (pp. 84–85), that the requirement that the usual mode of process adopted in the State shall be pursued refers to the proceedings for the arrest and examination of the accused before the Commissioner, but that it has no bearing upon the subsequent independent proceeding on *habeas corpus*.

missioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of *habeas corpus.* * * *

* * * * *

The evidence independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. * * *

See *Rodman* v. *Pothier,* 264 U. S. 399, 402–403; *Collins* v. *Loisel,* 259 U. S. 309, 314–317; *Rumely* v. *McCarthy,* 250 U. S. 283, 288–289; *Henry* v. *Henkel,* 235 U. S. 219, 228–230; *Peckham* v. *Henkel,* 216 U. S. 483, 487; *Haas* v. *Henkel,* 216 U. S. 462, 475; *Beavers* v. *Haubert,* 198 U. S. 77, 90; *Benson* v. *Henkel,* 198 U. S. 1, 8–9; *Greene* v. *Henkel,* 183 U. S. 249, 259, 260–261; *United States ex rel. Louis* v. *Laubenheimer,* 71 F. (2d) 814, 815 (C. C. A. 7th); *United States ex rel. Maggio* v. *Schneider,* 68 F. (2d) 50, 52 (C. C. A. 3d); *Burton* v. *Smithers,* 31 F. (2d) 966, 968–969 (C. C. A. 4th); *United States ex rel. Haim* v. *Mathues,* 19 F. (2d) 22, 23 (C. C. A. 3d); *Wood* v. *Cooper,* 18 F. (2d) 535, 538 (C. C. A. 8th); *Steeves v. Rodman,* 12 F. (2d) 915, 916 (C. C. A. 1st); *Benson* v. *Palmer,* 31 App. D. C. 561, 563, 569; *United States* v. *Wood,* 26 F. (2d) 908 (N. D. Texas); *United States* v.

Fogel, 22 F. (2d) 823, 825 (Minn.); *United States* v. *Fogel*, 22 F. (2d) 826 (Minn.). See also *South Carolina* v. *Bailey*, 289 U. S. 412, 422; Hardy on Removal of Federal Offenders, p. 78.

If, as we submit, the court below was correct in deciding that it was without authority on *habeas corpus* to overthrow the finding of the Commissioner that there was probable cause in the absence of unimpeachable evidence of innocence, there can be no question that the finding in this case should be upheld. In addition to the *prima facie* case afforded by the indictment, the Government introduced, not only as the court below seemed to think, evidence of identity, but proof that the accused committed at least two of the overt acts charged against him in the indictment, the 16th and 18th (*supra*, p. 4). The witness MacDonnell testified that the petitioner rented a safe deposit box at the St. Augustine National Bank as charged in overt act No. 16, and the witness Zapf testified that the petitioner registered at his hotel at Jacksonville Beach as charged in overt act No. 18 (Summary of Testimony, *infra*, pp. 49–51). It is true as the petitioner says that these places are located 40 and 20 miles, respectively, from Jacksonville, the place in which the conspiracy was to operate, and that the indictment does not specifically state the connection of these overt acts with the conspiracy charged, but the indictment does charge in express language that these overt acts were performed "in pursuance of

said conspiracy * * * and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof" (R. 15). It is easily perceived how or why this might be so, but whether these overt acts were, as charged, performed pursuant to and in furtherance of the objects of the conspiracy was, we submit, a matter for determination at the trial. The failure to allege specifically the exact connection of the overt acts with the conspiracy did not, of course, render the indictment defective, because the omission was susceptible of being supplied by the Government, on order of the trial court, by a bill of particulars if demanded. *Lefkowitz* v. *Schneider*, 51 F. (2d) 685, 687 (C. C. A. 3d Circuit). In that case the court said with reference to a similar contention to that advanced by the petitioner (pp. 687–688):

> The appellants complain that while these pleaded overt acts reveal acts by the four named defendants they fail to show their connection with the conspiracy and particularly they fail to show any connection of the appellants with the conspiracy, and that, in consequence, the indictment is bad under the decision in *United States ex rel. Mayer* v. *Glass, Marshal* * * * 25 F. (2d) 941 [a previous decision by the same court].
>
> The answer is twofold: First, section 37 of the Criminal Code (18 U. S. C. A., § 88) does not require that an overt act shall be

pleaded with respect to each of several alleged conspirators; the statute is satisfied by an averment and proof that "one or more of such parties (did) any act to effect the object of the conspiracy. * * *" And next, this case is distinguished from the *Glass* case where eleven defendants were charged with conspiracy by counts pleading forty-eight overt acts of which at least one was an overt act charged against each defendant and pleaded in a way which showed that the several overt acts pleaded in respect to the several defendants disclosed their whole connection with the conspiracy. That being so we held the averments as to the several defendants must mean what they said and must show that the acts grew out of or had some relation to the conspiracy. Applying that test we held that the indictment charged a crime as to some of them and did not charge a crime as to others. The trouble in the *Glass* case was that the pleader overpleaded his case, that he went further than was necessary as to some defendants and in doing so he was bound by what his averments showed and did not show as to them. In this case there are no averments of overt acts committed in furtherance of the conspiracy by the four appellant-defendants; but as that is not required there are enough overt acts pleaded with respect to other defendants to satisfy the statute, leaving the main body of the counts to charge and hold all defendants for conspiracy. As

> we cannot, from the four overt acts pleaded, see the whole scheme of the conspiracy we cannot say that they are not a part of the conspiracy or that they do not adequately apprise the defendants of the matter charged.

See also *United States ex rel. Maggio* v. *Schneider*, 68 F. (2d) 50, 52 (C. C. A. 3d).*

In this case the indictment makes it clear that the pleader did not, as in the *Glass* case, attempt in his statement of the overt acts to delineate completely the part to be played by each conspirator in the unlawful plan.

While we do not mean to say that there may not be a removal proceeding in which the defendant can show beyond controversy that the overt acts upon which the Government relies have no connection with the conspiracy charged, this is not such a case. The petitioner's attempted explanation of his presence in Florida, coupled with his failure to explain coherently his use of an alias while there, and his denial of any acquaintance or association with Goldberg, were certainly not convincing (see Sum-

* In the case of the petitioner's codefendant, Seeman, whose removal to Florida from New York was upheld by the District Court, the Circuit Court of Appeals and by this Court through the denial of certiorari (see footnote 3, p. 9, *supra*), the District Court held that proof of the 14th overt act (R. 18), which charges that Seeman and another conspirator rented a safe deposit box at the St. Augustine National Bank, was sufficient, when read in connection with the indictment, to show probable cause (see p. 194 of the record in No. 1023, last term).

mary of Testimony, *infra* pp. 55–57, 58, 59). The subsequent death of Fineberg ,with whom the petitioner had the alleged transaction while in Florida, removed from the field the one most able to contradict or corroborate the petitioner's story, and the Commissioner was certainly entitled to consider that fact in judging the truthfulness of the petitioner's explanation of his presence in Florida, especially as Fineberg's wife was also available, but was not introduced.

In addition to his own testimony, the only testimony of any moment introduced by the petitioner was the depositions of five of those implicated in the unlawful plan to misapply the funds of the bank. Petitioner places much reliance upon these depositions, but their probative value, if any, was, we submit, small (Summary of Testimony, *infra* pp. 51–54). The depositions of all of these deponents, except Carr, disclose that they either did not know all the conspirators or that transactions could have taken place in which the other conspirators participated with the petitioner without the knowledge of the particular deponent. If the petitioner, with knowledge that there was a conspiracy on foot, aided any one of the conspirators in the furtherance of the unlawful plan, even though he may not have known the other members of the conspiracy or been known by them, or even if he were unaware of all the details of the plan, he was, it is clear, as guilty as the most prominent member of the conspiracy.

See *Wilson* v. *United States*, 232 U. S. 563, 567; *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Pierce* v. *United States*, 252 U. S. 239, 244; *Coates* v. *United States*, 59 F. (2d) 173, 174 (C. C. A. 9th); *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10th); *Mendelson* v. *United States*, 58 F. (2d) 532 (App. D. C.); *Zottarelli* v. *United States*, 20 F. (2d) 795, 796, 798 (C. C. A. 6th), certiorari denied 275 U. S. 571; *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1st); *Jezewski* v. *United States*, 13 F. (2d) 599, 603 (C. C. A. 6th), certiorari denied 273 U. S. 735.

Carr, while apparently most anxious to help the petitioner, made it impossible to test the credibility of his testimony by resorting, when it appeared that the examination would become embarrassing, to the convenient device of refusing to testify on the ground that it would incriminate him under pending indictments.

In the light of this meagre showing against probable cause, rebuttal testimony does not seem to have been necessary. If the court below was correct in the test to be applied, it certainly cannot be said that the testimony offered by the petitioner against probable cause was of such a character that it could be called unimpeachable.

In any event the Government did not choose to rely solely upon the weakness of the showing against probable cause, but introduced affirma-

tive proof on rebuttal which strengthened its previous showing. In addition to the testimony of Special Agent Main, the admissibility of which is in dispute, it showed by the witness MacDonnell, who was recalled to the stand, that the petitioner was seen to enter the St. Augustine National Bank, where he had a safe-deposit box, in the company of one Goldberg, who also had a box there and whose participation in the conspiracy was made clear by two of the conspirators who gave depositions for the petitioner (Summary of Testimony, *infra*, pp. 58–59). In its opinion the District Court stated that because of the question as to the admissibility of Main's testimony, it had reviewed the evidence in detail, and reached the conclusion that, "the evidence in this case satisfies me that the Commissioner would have been amply justified in making the order of removal even had he not admitted, or disregarded, the testimony of the witness Main" (R. 159).

Not only do we believe that this conclusion of the District Court as to the weight of the evidence was correct, but we submit that even under the rule announced in the two principal cases upon which the petitioner relies (*Johnson* v. *Hotchkiss*, 35 F. (2d) 914 (C. C. A. 9th); *Meehan* v. *United States*, 11 F. (2d) 847 (C. C. A. 6th), there was sufficient evidence of probable cause. In those cases the rule, as announced in the *Meehan case* (p. 849), which was followed, was that "Wherever there is affirmative proof, unchallenged except by

the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment, the removal should be made." In the instant case the proofs of the petitioner's witnesses designed to show innocence were met by the Government's proof as to the commission by the petitioner of two of the overt acts charged in the indictment and also by the testimony of the witness MacDonnell as to the association of the petitioner with one whose participation in the conspiracy cannot be questioned. This proof of the Goverment, in addition to the indictment, created " substantial doubt ", at least, on the question of probable cause, or was sufficient to do so and may be finally assumed to have done so in the minds of the Commissioner, the District Judge, and the Circuit Court of Appeals.

While we do not believe that the doctrine announced in the *Johnson* and *Meehan* cases is the correct one, the fact that the rule there applied was met by the Government's proof in the instant case, is, we think, made even clearer by the fact situations presented in those cases and by the respective holdings. In the *Meehan* case an indictment charging a violation of the Anti-Trust law was returned against a trade association, a number of member corporations and firms and a number of officers of those corporations. The defendant Meehan was one of those officers. In a proceeding for removal there was introduced against him by the Govern-

ment, in addition to the indictment, a letter from the corporation to the trade association signed by him, which was in furtherance of the unlawful purpose of the association. The court held that under the rule it had announced, there was a sufficient showing of probable cause to permit removal. In the *Johnson* case the defendant was indicted with others for conspiring to violate the National Prohibition Act. Outside of certain evidence on rebuttal, which was held to be incompetent, and certain evidence which was held to have no tendency to show probable cause, the Government introduced no evidence of probable cause except the indictment. While the evidence introduced by the defense did not, we believe, arise to the point of "demonstrating lack of guilt" within the rule announced in the *Meehan* case and reiterated in the *Johnson* case,[9] the court held that it was sufficient to overcome the presumption arising from the indictment, that it then became incumbent upon the Government to offer additional proof tending to show probable cause, and that the Government had utterly failed in this respect.

[9] In the *Johnson* case the only evidence introduced by the defense in addition to the testimony of the defendant to the effect that he was not guilty of the crime charged and testimony of character witnesses, was the testimony of four of the six conspirators that they did not know the defendant in question and had never had any dealings with him. As pointed out at pp. 35–36, *supra*, such evidence is obviously of little, if any, probative value in a conspiracy case.

The situation presented in the *Johnson* case is obviously different from that involved here. Even if the testimony of Agent Main be disregarded, it cannot be said that the Government did not introduce evidence in addition to the indictment tending to show probable cause. As heretofore pointed out, the Government's additional evidence created at least substantial doubt upon the question of probable cause, which under the *Meehan* and *Johnson* cases was sufficient to permit removal. Cf. *Grigg* v. *Bolton*, 53 F. (2d) 158, 160, 161 (C. C. A. 9th); *Ex parte Foo Guey*, 53 F. (2d) 207, 208, (C. C. A. 9th), decisions by the court which decided the *Johnson* case; also *United States* v. *Andrade*, 10 F. (2d) 572, 576–577 (N. D. Texas), one of the cases cited by the petitioner.

We have heretofore chosen to rest our contention that there was probable cause for the removal of the petitioner upon the evidence outside of that given by Agent Main, because of the question raised by the petitioner as to the admissibility of his testimony. This question is discussed in point II *infra*. We believe, however, that the rules of evidence are not as strict in removal proceedings as they are in trials in court and that Main's testimony was competent. If that is so, there can hardly be any question as to the sufficiency of the Government's showing of probable cause. The testimony of Main shows that David N. Chadwick, contrary to his deposition in behalf of the petitioner, had told Main that the petitioner was one of the prime movers in

the conspiracy and was the one instrumental in drawing Chadwick and his brother into the unlawful plan. Main's testimony also shows that, contrary to his deposition, Dickson had told him that the petitioner had taken part in the conspiracy but that he did not know exactly what part he took. The testimony of Main as to the statements of these two witnesses is set forth at length in the Summary of Testimony, *infra*, pp. 59–65. These statements clearly establish the petitioner as one of the conspirators, if not as an actual aider and abetter in the commission of the offenses charged in the substantive counts.

II

THE ERROR, IF ANY, IN THE ADMISSION BY THE COMMISSIONER OF THE TESTIMONY OF SPECIAL AGENT MAIN DOES NOT ENTITLE THE PETITIONER TO HIS DISCHARGE ON HABEAS CORPUS.

The petitioner contends that the testimony of Special Agent Main, as to the statements made by Dickson and David N. Chadwick contrary to their depositions admitted on behalf of the petitioner, was incompetent because these witnesses were not given an opportunity on cross-examination to explain the contradictory statements, and his position apparently is that the admission of this alleged incompetent evidence entitled him to his discharge on habeas corpus.

At the outset it should be pointed out that the contradictory statements made by Dickson and Chadwick were made both before and after the giving of their depositions (Summary of Testimony, pp. 62, 63, *infra*). The argument of the petitioner

here proceeds on the assumption that all the contradictory statements were made prior to the taking of the depositions. It was, of course, obviously impossible for the Government to have cross-examined the deponents at the time their depositions were taken as to the statements made subsequent to the depositions. The usual rule as to the laying of a foundation for the admission of contradictory statements made prior to the testimony sought to be contradicted would not, therefore, seem applicable. Considerations of convenience require that a witness whose testimony it is sought to contradict by prior inconsistent statements be interrogated as to such statements while available, but no such considerations can, of course, apply in the case of a witness who, after he has given his testimony, has made contradictory statements and is not available for examination at the time these statements are sought to be utilized.

As to the contradictory statements made by the deponents prior to their depositions, while it is true that the United States was represented at the taking of these depositions by an Assistant United States Attorney and that he cross-examined the deponents, it should also be stated that, as explained at the removal proceeding, the depositions were not taken either in the demanding district or the district where the petitioner was found, and the United States was represented by an Assistant United States Attorney who was not familiar with the case (R. 120, 129, 146); that the deposition of Chadwick, if not of Dickson, was taken on short

notice (R. 120), and that while Main, the witness who testified as to the contradictory statements, was present at the taking of Dickson's deposition (R. 126), there is nothing in the Record to show that he was present when Chadwick's deposition was taken (R. 120–137).[10] The statements of Chadwick more seriously implicated the petitioner in the conspiracy than did those of Dickson, as Chadwick stated the petitioner was a prime mover in the conspiracy, while Dickson merely said that the petitioner took part in the conspiracy but he did not know what his part was (Summary of Testimony, pp. 60, 62, *infra*).

We do not, of course, dispute the rule generally recognized that in a trial court the former statements of a witness may not be used to contradict his testimony unless he is first given an opportunity to explain such statements. *Ayres* v. *Watson,* 132 U. S. 394, 404; *Mattox* v. *United States,* 156 U. S. 237, 245 et seq.; Jones' Commentaries on Evidence, 2d. Ed., Vol. 6, § 2402.[11] We are, however, here dealing with a proceeding essentially informal in character, and we believe there is sound basis for saying, as did the court below (R. 167), that in such a proceeding "the rules of evidence are slacker than in trials in court." (R. 167.) As was pointed out in the *Gault* case, *supra* (p. 150), R. S. 1014 entrusts proceedings to commit for re-

[10] Chadwick's deposition was taken on October 26, 1933; Dickson's on June 20, 1933.

[11] Wigmore on Evidence indicates, however, that there is some authority for the relaxation of the ordinary rule in the case of depositions (vol. 2, 2d ed., Sec. 1030).

moval not only to judges and commissioners of the United States, and judges of State Courts, but also to any "mayor of a city, justice of the peace, or other magistrate of any State" where the offender may be found. Obviously, a mayor or magistrate, not a lawyer, cannot be expected to be familiar with the technical rules of evidence, and as the Court said in the *Gault* case, he should not be held "to more than avoiding palpable injustice." Including as it does hearings before laymen, "the statute", to use the language of the court below, "cannot aim at more than informal justice, certainly not in full panoply of the common law." In *United States* v. *Greene,* 108 Fed. 816 (S. D. N. Y.), it was said (pp. 819–820):

> The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by the government was received by him; but as stated in the former decision, *the evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial;* and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. * * * (Italics ours.)

See also *United States* v. *Kallas*, 272 Fed. 742, 749 (W. D. Wash.).

But even if the Commissioner should not have admitted and considered the testimony of Agent Main, it is well settled that the reception and consideration of incompetent evidence does not alone afford a basis for release on habeas corpus. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106. If there is any competent evidence to support the finding of the Commissioner, that is all that is required on habeas corpus. *Collins* v. *Loisel*, 259 U. S. 309, 314–315, *supra*; *Hughes* v. *Gault*, 271 U. S. 142, 151, *supra*. Even if the testimony of Agent Main be eliminated, there was, as we have heretofore pointed out, sufficient other evidence in the instant case, the competency of which cannot be questioned, justifying the Commissioner's finding of probable cause.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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MARCH 1935.

APPENDIX A

STATUTES INVOLVED

Section 1014 R. S. (U. S. C., Title 18, Section 591) provides:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

Section 5209 R. S., as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972

(U. S. C., Title 12, Section 592), so far as pertinent, provides:

> Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or who, without authority from the directors of such Federal reserve bank or member bank, issues or puts in circulation any of the notes of such Federal reserve bank or member bank, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; and every receiver of a national banking association who, with like intent to defraud or injure, embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misde-

meanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

Section 37 of the Criminal Code (U. S. C., Title 18, Section 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

APPENDIX B

SUMMARY OF TESTIMONY

To show probable cause the Government introduced a certified copy of the indictment (R. 37–39, 57), and testimony of two witnesses, Augustus O. MacDonnell and Gene Zapf. After MacDonnell had testified that he had been the Vault Custodian at the St. Augustine National Bank at St. Augustine, Florida, for four years and was such in April 1932, he identified two cards. One of these was an agreement to rent a safe deposit box at the bank for a year, signed with the name of Arthur Starke, one of the aliases under which petitioner was named in the indictment. MacDonnell stated that this card was signed in his presence by the lessee and that he placed his signature thereupon as a witness to indicate that the lessee was personally present when he signed the card. The other card was a record of the calls of Arthur Starke at the safe deposit box. It was the custom of the bank for the lessee of a safe deposit box to sign his name upon the record card whenever he visited the box and for the Vault Custodian to place his initials alongside the lessee's signature, and MacDonnell stated that he was present upon each occasion that Starke called at his box.[1]

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[1] The two cards above referred to do not appear in the Record, but from the cross-examination of MacDonnell it appears that the card containing the agreement to lease the

MacDonnell then testified that he was a witness before the grand jury in Florida which returned the instant indictment and proceeded to point out the petitioner as the person known to him as Arthur Starke and as the person with reference to whom he testified before the grand jury. The person pointed out admitted that he was Arthur Kassin, the petitioner. (R. 39–42, 56.)

The Government then placed upon the stand Gene Zapf, who, after testifying that he was then and had been in 1932 the Manager of the Casa Marina Hotel at Jacksonville Beach, Florida, identified a card which showed that Arthur Starke had registered at his hotel on April 24, 1932 (R. 44–45). This card, he stated, was signed by Starke in his presence (R. 45). Zapf then pointed out a man in the hearing room whom he knew as Arthur Starke (R. 45–46). He testified that on the same day the man whom he had pointed out as Starke had approached him in the subway for the purpose of shaking hands (R. 46–47), and that on the preceding day he had identified a picture shown him by an Agent of the Department of Justice as that of Starke (R. 49–50, 51). MacDonnell stated he was with Zapf when Zapf was approached in the subway by Starke and then testified that Starke was the man whom he had previously identified in the courtroom (R. 53). This man, as stated above, admitted upon his identification by MacDonnell that he was Arthur Kassin, the petitioner. Zapf was not a witness before the grand jury (R. 47).

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safe deposit box was signed on April 30, 1932, and that according to the record card, the lessee had visited the box twice on May 2, 1932, once on May 5, 1932, and once on May 9, 1932 (R. 60).

Both MacDonnell and Zapf were cross-examined at considerable length by counsel for the petitioner (R. 42–44, 46, 47–48, 49–52, 53–54, 58–63).

After the Government had rested (R. 57), the petitioner moved to dismiss the case upon the ground that the Government had failed to show probable cause and had failed to prove the identity of the defendant. The Commissioner, however, denied this motion and allowed an exception (R. 63).

For the purpose of attempting to show lack of probable cause the petitioner introduced the depositions of Richard Gillman, David N. Chadwick, Julius L. Chadwick, Leo Carr and John Dickson, all taken pursuant to orders obtained by the petitioner from the District Court for the Southern District of New York (R. 66–67, 89, 146). All of these deponents except Dickson and David N. Chadwick were parties defendant to the indictment in the instant case (R. 13–37).[2]

Gillman was an inmate of the Florida State Penitentiary and had been convicted and sentenced in the Florida State Court in connection with the passing of some of the forged checks, which, according to the indictment in the instant case, were used in misapplying the funds of the Florida National Bank (R. 89–90, 149). All of the other de-

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[2] Gillman was indicted under the name of Joseph Kramer and also under a number of aliases, including that of Richard Gillman (R. 14). He admitted that his correct name was Joseph Kramer (R. 92).

Carr was indicted under the name of Leo Grombecker and also under a number of aliases, including that of Leo Carr (R. 13–14).

ponents were inmates of the Federal Penitentiary at Atlanta, and had either been convicted or pleaded guilty and sentenced under the instant or other indictments for participating in the misapplication of the bank's funds. Dickson, it appears, was the passer of a number of the forged checks (R. 129–130, 138–139, 146, 148).

Gillman and Carr testified that they knew, or were in a position to know, all of those connected with the offenses charged in the indictment, and that the petitioner was not one of those who participated in those offenses (R. 90–91, 139–140).

On cross-examination Gillman admitted, however, that as the result of certain conversations in New York he thought he was going to Florida in connection with a liquor transaction (R. 97), and that he did not know, at least until the time of his arrest, that he was assisting, by the passing of forged checks, in the manipulation of the funds of the Florida National Bank (R. 99, 108); that while he knew Dickson, Carr, and Goldberg, one of the defendants named in the indictment, prior to his arrest, he had not heard of the Chadwicks until after his arrest, and that he had not known before that time that they had any connection with the offenses (R. 99–100).[3]

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[3] Julius L. Chadwick, according to the indictment, was an employee of the Florida National Bank and the "inside man" who was utilized by the conspirators from the inception of the conspiracy to cover up their operations against the bank (R. 13–37). David N. Chadwick was the brother of Julius L. Chadwick and the one who, at the instance of the petitioner, induced Julius Chadwick to enter into the unlawful scheme (pp. 60–61, *infra*).

Gillman also admitted that "There may have been some [transactions] that I wasn't present at" (R. 108).

While Carr was apparently anxious to exonerate the petitioner, his cross-examination was considerably hampered because he refused to answer various questions about the offenses involved, for the reason that there were other indictments pending against him (R. 140–145).[4]

David N. Chadwick in his deposition testified on direct examination, when shown a photograph of the petitioner, that so far as he knew the petitioner was in no wise connected with the conspiracy to defraud the Florida National Bank or the series of forgeries against this bank. He stated that while he was acquainted with most of the individuals participating in these offenses he did not know all of the offenders (R. 129–131). On cross-examination this deponent admitted that he knew a man by the name of Arthur Stern, one of the aliases under which the petitioner was indicted; that he thought he had seen Arthur Stern about February or March 1932 in Florida; that he had seen Arthur Stern in Virginia a considerable period of time prior to that, "it could have been two months; it could have been four; it could have been six", but he did not think it could have been two weeks. When first asked whether Arthur Stern had introduced him to Leo Carr, who pleaded guilty

[4] In a previous attempt by the petitioner several months earlier to examine Carr, he had refused even to testify as to whether he knew the petitioner, or to give any testimony, on the ground that it might tend to incriminate him because of the pendency of the indictment involved in the present case (R. 157–158).

to the indictment (R. 132), the witness stated that he did not recall, but later said that the man whose photograph had been shown to him, the petitioner, was not the man who introduced him to Carr. (R. 134.) He admitted that any one of the one hundred and ten million people in the United States could have been connected with the conspiracy without his knowledge (R. 131–137).

In his deposition, Julius L. Chadwick testified that so far as he knew the petitioner had nothing to do with the series of transactions involved in the indictment. But he admitted that the only conspirators he knew were his brother, David Chadwick, and Carr, that he did not know how many people Carr might have cooperated with, and that he could have cooperated with petitioner without his knowledge (R. 138–139).

John Dickson in his deposition testified that he was familiar "with all of the acts conducted against the Florida National Bank", and that petitioner did not participate in any of them or the arrangements between the individuals concerning these transactions. He admitted that he did not know all of the persons involved in the "commission of this series of crimes." (R. 147.) Dickson stated on cross-examination that the conspirators whom he knew would have taken him into their confidence with reference to any transactions which they had with others. He admitted, however, that they could have had such transactions without his knowledge as he was not with them all of the time (R. 146–156).

Following the introduction of these depositions, the petitioner moved to dismiss the proceeding.

but this motion was denied, the Commissioner saying (R. 67):

> The Government of the United States is assumed not to be acting overzealously. They had a grand jury that indicted this man as part of the conspiracy. If it was larceny or a substantive offense of any kind, and you had made the same showing as you make in this, there may be something in your favor; but this is a conspiracy charge and I cannot see where you have obliterated the probable cause entirely.

It was then stipulated that if certain witnesses were called, they would testify that they knew the reputation of the petitioner for honesty and veracity and that such reputation was excellent (R. 68).

Petitioner then took the stand. While he testified that he was a resident of New York City, he admitted that he was in Florida "three times during the racing season", the first time in January 1932. He apparently went there again in February 1932, and also during the early part of April 1932. The explanation which he gave of his visits to Florida was as follows: He stated that he went to Florida for a vacation during the racing season, starting evidently in January 1932; that he there met a man named Fineberg, who had since died from heart failure (R. 74); that Fineberg told him that he was a resident of Jacksonville and well connected politically in the State; that the two talked about a mint-vending machine; that petitioner heard from Fineberg during the early part of February, Fineberg telling him that he had started a business in St. Augustine, which concerned itself

with mint-vending machines; that the petitioner then went to Jacksonville to see Fineberg; that Fineberg said he was ready to do business; that petitioner told Fineberg that he would do business if Fineberg would put up a like amount of money to buy the machines; that Fineberg said that his money was then tied up and he would like to have some time to arrange to get the money; that there was some discussion with reference to the division of profits, and Fineberg requested further time to think over the matter; that the petitioner heard from Fineberg again about the latter part of March or the beginning of April 1932; that Fineberg wrote him that he should come down again, as he was ready to do business and to put up a like amount of money; that the petitioner went down to Jacksonville, taking with him $2,500.00; that he registered at the Casa Marina Hotel at Jacksonville Beach (R. 44–45) in the name of Arthur Starke, but only stayed there a few days and then went to St. Augustine; that he rented a vault at the St. Augustine National Bank as he felt it was unwise to carry so much money on his person; that Fineberg failed to put up the money and the venture fell through, whereupon petitioner withdrew his money from the bank and left. The petitioner denied that he knew any of the defendants named in the indictment or that he had participated in or had any connection with any of the crimes charged therein. (R. 68–72.)

When asked on cross-examination why he used a fictitious name when he was in Florida, petitioner gave the following enigmatical answer (R. 73):

> * * * A. When I went down to Florida, I didn't have any idea of using a

fictitious name, but being on account I was talking to some people about it, and I told that to Mr. Finberg in reference to the proposition, so I did not want it to get around about the proposition, so he said, "I think you had better use"—it was his suggestion —"use a different name."

Q. You mean because you did not want any people to know that you were down there on that proposition? A. No; that they should not—the people I was speaking to knew that Mr. Finberg was going to be connected with me, and he suggested that I use a different name, so they would not know that I was down there if they wanted to reach me, because of saying to these people that I went down there on my own hook.

Q. It might interfere with this business? A. Yes, sir.[5]

While petitioner stated that although Fineberg was not available because he had died, Fineberg's wife knew the purpose for which the petitioner had been to Florida, and he thought he could get an affidavit from her (R. 74), no such affidavit appears in the Record.

Petitioner's wife testified that she knew the petitioner was in Florida in April 1932, in connec-

[5] When asked by the Commissioner who it was introduced him to Fineberg, petitioner stated that he was introduced by a man named Arthur Harris. While it may be of no particular significance, it is interesting to note that Richard Gillman, a passer of a number of the forged checks (R. 107; cf. R. 148–149, 156), stated in his deposition that when he went down to Florida from New York City in connection with what he supposed was a liquor transaction, he was met by a man named Charles Harris, which he thought was his correct name (R. 97–98, 104); that Harris was the "go-between" between Goldberg and Carr (R. 104).

tion with the distribution of mint-vending machines because she had seen a letter which he had received from Fineberg (R. 74–75).

The petitioner then rested (R. 75) and upon inquiry by the attorney for the United States as to whether the indictment had been sufficiently proved and identity established, the Commissioner replied in the affirmative. The only question which remained open, the Commissioner stated, was that of probable cause (R. 78).

In rebuttal the Government recalled MacDonnell, the Vault Custodian of the St. Augustine National Bank, and also placed upon the stand Roger L. Main, a Special Agent of the Bureau of Investigation of the Department of Justice.

MacDonnell stated that he had testified before the grand jury not only against the petitioner but also against the defendant Goldberg. He was then asked whether he had seen the petitioner in the company of any of the other defendants named in the indictment, and he replied that he had seen him in the company of Goldberg, alias Phillips (R. 79).

He stated that Goldberg, in the name of Phillips, had a safe-deposit box at the bank at the same time that the petitioner did, during April and May 1932; that on one occasion he saw petitioner and Goldberg come into the bank together; that they walked down the lobby of the bank towards the entrance to the safe-deposit vault and Goldberg stopped half way down and sat on a bench in the lobby; that the petitioner went on in to the safe-deposit box, made a deposit, and then went out; that the witness did not notice whether Goldberg and the petitioner left the bank together (R. 78–87).

The testimony of John Dickson indicates that Goldberg was associated with Carr in the furnishing of the forged checks which Dickson and Gillman passed (R. 156; see also R. 146, 152).

The testimony of Gillman, while more evasive with respect to Goldberg's part in the scheme, showed clearly that Goldberg and Carr were associated together (R. 104). In fact, Gillman stated in his testimony that so far as the Government was concerned the one to get was Goldberg (R. 104–105).

After MacDonnell had finished testifying, the petitioner was recalled to the stand and stated that he had never walked into the St. Augustine National Bank with anybody named Goldberg and that he did not know Goldberg (R. 108–109).

Roger L. Main, a Special Agent of the Bureau of Investigation of the Department of Justice, testified (R. 116–128) that he was stationed at Jacksonville, Florida; that he made an investigation of the case against the petitioner, David N. Chadwick and others; that during the course of his investigation he talked with Chadwick; that the first time he talked with Chadwick it was shortly after the middle of June 1932, when Chadwick was removed to Jacksonville from Wilmington, North Carolina; that there was no talk at that time of the petitioner, who was not then known in the case; that several days later Chadwick was again interviewed and at that time admitted knowing two of the defendants but made no reference to the petitioner; that about three weeks later he questioned Chadwick about "a man named Arthur Starke and Arthur Stern"; that Chadwick then stated that this man had only a minor part in the case and that he "did not know

whether he wanted to disclose his identity"; that in October 1932 the witness had another talk with Chadwick and Chadwick stated that he had talked the case over with his lawyer and had decided that he was going to furnish the Government some information on all of those connected with the forgery scheme, and that he was ready to give some information about Arthur Stern and Arthur Starke; that he then said Arthur Starke was the petitioner, and that he would later furnish the petioner's address and give a name under which he had been arrested in New York so a photograph could be obtained; that shortly thereafter he told the witness that the petitioner was one of the prime movers in the forgery scheme; that the petitioner is the man who introduced him to Goldberg and Carr at the George Washington Hotel in Jacksonville; that the petitioner had registered at the George Washington Hotel in Jacksonville under the name of Stern; that on November 25, 1932, Chadwick was again interviewed; that he then stated that the forgery scheme was first brought to his attention at Richmond, Va., by the petitioner, who was at that time using the name of Archie Stone, one of the aliases mentioned in the indictment; that Chadwick stated that he was at the time in difficulty in Richmond; that the petitioner had arranged for his bond, and that the petitioner threatened to go off his bond unless he made his brother, Julius L. Chadwick, who was employed in the Florida National Bank, furnish the name of an account which would stand a forgery scheme and assist in putting across a forgery scheme on that account; that several days later Chadwick gave the witness the petitioner's address in New York

City and said that he knew that petitioner lived there up until June 1932; that a few days later a photograph was displayed to Chadwick, which he immediately identified as that of Archie Kassin, the petitioner; that this was the first direct information the Government had as to the identity of Archie Kassin; that after Chadwick had identified this photograph he elaborated on the petitioner's part in the scheme and stated that the petitioner had instructed him to get a check from his brother on a certain account from the Florida National Bank and to send this check to the petitioner in New York; that Chadwick arranged with his brother to get the check, which was forwarded to New York; that petitioner returned it in about 15 days; and that Chadwick later returned it to his brother in the bank; that later Chadwick was interviewed in the presence of the witness and of other officials of the Department of Justice in Florida, and again related the circumstances under which the petitioner "presented this forgery scheme at Richmond, Virginia, and he related some details as to how he obtained the check from his brother", and forwarded it to petitioner in New York; that Chadwick then appeared before the grand jury which returned the indictment in this case. All of these interviews between the witness and Chadwick took place prior to October 26, 1933, the date when Chadwick's deposition was taken at Atlanta after he had been incarcerated in the Atlanta Penitentiary pursuant to a plea of guilty (R. 122, 129). In this deposition Chadwick had stated that so far as he knew the petitioner was in no wise connected with the conspiracy to defraud the Florida National Bank or the series of

forgeries against this bank. (See pp. 53–54, *supra*.)

The witness also testified that on November 20, 1933 after Chadwick's deposition had been taken, he had a talk with Chadwick at the Atlanta Penitentiary concerning the petitioner's part in the offenses; that Chadwick stated (R. 124):

> he told the truth when he testified before the Grand Jury as to Archie Kassin and all the others in this case, that at this time he was like a crazy man, he did not know what was the matter with him. I asked him what prompted him to make a deposition in the manner in which he did. He said, "Well, I have to be here and I am trying to get some relief for my family", and he said, "This is the only hope I have."

That Chadwick further stated that the Government could still depend on him to testify in the case; and that if he was taken to Jacksonville, "he would truthfully testify as he had told me previously as to Kassin's part in this case"; and that Chadwick told the witness that previous to the making of the denial in his deposition that petitioner had any part in the offenses involved, an attorney by the name of Spector had seen him four or five times (R. 124). Spector was the attorney who represented the petitioner at the taking of Chadwick's deposition (R. 129).

Main also testified that about the latter part of November 1932, or the first part of December 1932, after John Dickson had been removed to Jacksonville from New York, he had a talk with Dickson; that he asked Dickson if he knew the petitioner, and that he said he did; that the witness asked Dickson what part the petitioner had in the forgery

scheme and that the witness stated, "he could not specifically state his part, but he saw Kassin at the Cassa Marina Hotel while he and Gillman were stopping there,"; that Dickson stated that he knew the petitioner was in New York City after he, Dickson, had fled from Jacksonville after the forgery scheme had been discovered because he met the petitioner there several times, and he asked the petitioner to send some money to Gillman to assist him in his defense in the State Court; that Dickson furnished the witness an address in New York City where, he said, the petitioner had an apartment (R. 125–126). This interview took place prior to the taking of Dickson's deposition at Atlanta on June 20, 1933 (R. 145–146). Dickson had stated in this deposition that he was familiar "with all of the acts conducted against the Florida National Bank", and that the petitioner did not participate in any of them or the arrangements between the individuals concerning these transactions. (See p. 54, *supra.*)

The witness also testified that on the same day that Dickson's deposition was taken but after it was taken, he asked Dickson why he had declined to say that he knew the petitioner, and that Dickson said, "Well, I told the truth in Jacksonville and it got me in the penitentiary," and he said, "Why, it won't hurt me to lie a little bit now"; and he would not talk any further (R. 126).

After first making an objection to the admission of any conversation had by Main with Chadwick and Dickson (R. 117), the petitioner moved to strike out all of Main's testimony with reference to the statements inconsistent with his depo-

sition which Chadwick made to Main prior to the taking thereof, on the ground that no proper foundation had been laid by the Government for their admission because it had not cross-examined Chadwick as to them when the deposition was taken. This motion was denied after the Assistant United States Attorney, who was then representing the Government at the removal proceeding, had pointed out that the technical rules of evidence do not apply in such a proceeding and after he had also pointed out that "This deposition was taken in Atlanta, it was taken on short notice, the attorneys in Florida who were familiar with the case were not present, the cross-examination was conducted by an Assistant United States Attorney from Atlanta who was unfamiliar with the case" (R. 119–120). The statements made by Chadwick after his deposition was taken were objected to as incompetent, irrelevant, and immaterial (R. 123), the position of the petitioner with respect to these statements apparently being that the Commissioner was bound by the sworn deposition of Chadwick, and that if the Government wished to introduce these subsequent inconsistent statements, it was its duty to issue a commission to take the deposition of Chadwick (R. 124). The testimony of the witness with reference to the inconsistent statements made by Dickson prior to his deposition was objected to by the petitioner on the ground that they were hearsay and incompetent and that "no proper foundation has been laid for the taking of the deposition of Dickson" (R. 125). Main's testimony as to the statements made by Dickson subsequent to his deposition was not objected to at the time the

testimony was given but after the petitioner's cross-examination of Main, he moved to strike out all of the testimony given by the witness as to Chadwick and Dickson on the ground that it was irrelevant, immaterial, and incompetent and for the reason that "it is an improper method of contradicting and impeaching a witness" (R. 127–128). This motion was denied and an exception allowed (R. 128). The petitioner then moved to strike out all the testimony given by the witness as against both Chadwick and Dickson, which took place prior to the time of the taking of their depositions. This motion was denied and an exception taken (R. 128).

The only other testimony introduced at the hearing was that of an attorney named Irving La-Deutscher, who testified that pursuant to a commission to take the testimony of Jerome Goldberg, who was at that time incarcerated in jail, he went to Florida to see Goldberg but that Goldberg decided, in view of the fact that he was himself awaiting trial in connection with the indictment in the present case, it would not be advisable for him to make a deposition. Although Goldberg told the witness that he had known Kassin for over twenty years and that Kassin had nothing whatsoever to do with the crime, he refused to give a deposition for the reason that if he gave testimony in the case, cross-examination would open the door to his activities and give away his defense in the case (R. 109–115).

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SUPREME COURT OF THE UNITED STATES.

No. 569.—October Term, 1934.

United State of America, on relation of Arthur Kassin, Petitioner, *vs.* Raymond J. Mulligan, United States Marshal for the Southern District of New York, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 13, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner by writ of habeas corpus in the district court for southern New York sought to test the validity of his commitment by a United States commissioner in proceedings for removal under R. S., § 1014, 18 U. S. C., § 591. After hearing upon the transcript of the proceedings before the commissioner, the district court dismissed the writ. The Circuit Court of Appeals affirmed. 73 F. (2d) 274. The questions presented are: Whether, as the Circuit Court of Appeals held, review of the commissioner's decision ends when the court is assured that he has honestly considered all the evidence presented to him. Is the evidence sufficient to warrant petitioner's removal? Should the commissioner's findings be set aside for error in the admission of evidence?

Petitioner and six others were indicted in the southern district of Florida for conspiracy, 18 U. S. C., § 88, to misapply, and for the misapplication of, funds of a bank in violation of 12 U. S. C., § 592. Overt acts alleged against him are that, under the name of Arthur Starke, he registered at a Jacksonville Beach hotel and rented a safe deposit box at a St. Augustine bank. He was found in the southern district of New York, and complaint was made to a commissioner in that district praying his arrest and removal for trial. He was brought before the commissioner and, at the hearing that followed, the United States produced a certified copy of the indictment and called witnesses whose testimony tended to prove that petitioner committed the overt acts and that on one occasion when he visited the safe deposit box a codefendant, Goldberg, was with him.

Petitioner admitted the overt acts. But he said: He had no connection with the conspiracy and did not know any of the persons ac-

cused. He went to Florida to engage in business with one Finberg, who died before the hearing, and for that purpose brought a large sum of money for the safe keeping of which he hired the box. He assumed the false name at Finberg's suggestion in order to keep secret their connection. He had never been convicted of crime. It was stipulated that, if called as witnesses, certain persons acquainted with petitioner would testify that his reputation for honesty and veracity was excellent. He introduced depositions of five persons implicated, three of whom were codefendants. They testified that they did not know petitioner or have any knowledge of his participation in the offenses charged. Two of them, professing to know all who were involved, definitely asserted that petitioner was not one of them. The other three did not know all the conspirators. Goldberg refused to depose; the other two defendants did not testify. The government called a special agent of the Department of Justice as a witness in rebuttal. The commissioner, notwithstanding objection that it was incompetent, received his testimony to the effect that both before and after giving their depositions two of the deponents, who had sworn that they did not know petitioner, had said that they did know him and that he had participated in the crimes. The commissioner found that there was probable cause to believe that petitioner had committed the offenses and held him to await the action of the district judge.

Removal from one federal district to another under § 1014* is unlike extradition or interstate rendition, in that the protection owed by a sovereign to those within its territory is not involved. *Beavers* v. *Henkel*, 194 U. S. 73, 82-83. A person accused by indictment and found within the district where he is wanted is not entitled to a hearing in advance of trial. *Beavers* v. *Henkel*, *supra*,

*For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognisance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

84. The statute gives such a right to one otherwise accused. There is no constitutional right to a hearing in advance of removal. Undoubtedly, Congress has power to direct that accused persons be taken, immediately and without hearing, before the court for trial. *Hughes* v. *Gault*, 271 U. S. 142, 149, 152. But, as otherwise hardship and injustice might result, it has given a right to examination and hearing. *Beavers* v. *Henkel*, *supra*, 83. *Tinsley* v. *Treat*, 205 U. S. 20, 29. *Hughes* v. *Gault*, *supra*. In removal proceedings, the case of an indicted person is to be distinguished from that of one accused only by complaint filed with the commissioner. Identity being shown or admitted, the indictment without more prima facie requires the order of removal. *Greene* v. *Henkel*, 183 U. S. 249, 262. *Benson* v. *Henkel*, 198 U. S. 1, 10-12. *Hyde* v. *Shine*, 199 U. S. 62, 84. *Haas* v. *Henkel*, 216 U. S. 462, 481. Evidence is required to support the allegations of the complaint.

It may not with perfect accuracy be said, as in some removal decisions it has been said or implied, that the indictment is evidence of the facts that it alleges. But it fulfills the constitutional requirement (Amendment V), establishes probable cause (Amendment IV) and is itself authority to bring the accused to trial. In the absence of evidence requiring a finding that there is no ground for the prosecution, the government is entitled to an order for removal. *Beavers* v. *Haubert*, 198 U. S. 77, 90. *Price* v. *Henkel*, 216 U. S. 488, 493. *Cf. South Carolina* v. *Bailey*, 289 U. S. 412, 420. The indictment is not conclusive, for under § 1014, the petitioner has the right to introduce evidence in opposition to the showing made against him. *Tinsley* v. *Treat*, *supra*, 32. But as the order of removal adjudges nothing affecting the merits of the case and amounts to no more than a finding that the accused may be brought to trial, the commissioner is without power to rule on disputed questions of law whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. *Henry* v. *Henkel*, 235 U. S. 219, 229. *Stallings* v. *Splain*, 253 U. S. 339, 344-345. *Morse* v. *United States*, 267 U. S. 80, 83. And for like reasons he may not decide controverted or doubtful issues of fact. *Rodman* v. *Pothier*, 264 U. S. 399, 402. In view of the delays and obstructions that it is possible for persons accused to obtain and interpose by misuse of the right to be heard before removal (*Cf. Salinger* v. *Loisel*, 265 U. S. 224, 238), section 1014 is to be construed quite favorably to the government's applications. *Benson* v. *Henkel*, *supra*, 15. *Haas* v. *Henkel*, *supra*, 475.

The application for the writ of habeas corpus alleges that the evidence adduced by petitioner overwhelmingly established his innocence, completely destroyed the presumption of probable cause emanating from the indictment and established the lack of probable cause to believe him guilty. By reference, it includes a transcript of the evidence and asserts that the finding and order of the commissioner are contrary to law. Respondent's return puts in issue these allegations. The question so raised is whether petitioner is unlawfully deprived of his liberty. He was entitled to introduce evidence to prove the absence of probable cause and to have the commissioner judicially to consider it. We have held that exclusion of competent evidence is a denial of right given by § 1014. *Tinsley* v. *Treat, supra.* Equally repugnant to the statute is refusal to consider evidence in favor of the accused. Arbitrary or capricious appraisal of evidence or disregard of facts indubitably established is in legal effect failure to consider, the equivalent of the exclusion that we have condemned, and denial of the right to be heard before removal.

The lower courts were successively called on to decide on the merits of petitioner's claim. A memorandum opinion of the district court shows that it considered the evidence in detail and found that the commissioner's decision would have been amply justified even if he had not admitted the impeaching testimony introduced by the government in rebuttal. The Circuit Court of Appeals following its earlier decision, *United States* v. *Pulver,* 54 F. (2d) 261, declined to examine the evidence upon the ground that "our review of his [the commissioner's] decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further." We disapprove that declaration. By the appeal that court was called on to examine the evidence and to decide whether it was sufficient to require a finding that there was no substantial ground for bringing the petitioner to trial on any charge specified in the indictment.

We find that the evidence fails by far to measure up to that standard, and approve the decision of the district court. The lower courts rightly held that the admission of the rebuttal testimony of which petitioner complains does not require that the commitment be set aside.

Affirmed.